

*United States Court of Appeals
for the Second Circuit*



APPENDIX

B
PFS

75-1329

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

FRANCISCO ADRIANO ARMEDO-SARMIENTO and
LIBARDO GILL a/k/a RAMIRO ESTRADA,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

KASSNER & DETSKY, P. C.
Attorneys for Appellants
122 East 42nd Street
New York, New York

PAUL J. CURRAN
U. S. Attorney
Southern District of New York
Attorney for Appellee
United States Court House
Foley Square
New York, New York



PAGINATION AS IN ORIGINAL COPY

Table of Contents

	Page
Docket Entries	1a
Transcript	8a
Memorandum Decision and OrderAppealed From	93a



1a

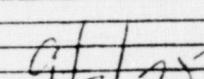
Docket Entries.

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

JUDGE CANNELLA.

75 CRM 429

D. C. Form No. 100 Rev.

TITLE OF CASE		ATTORNEYS
THE UNITED STATES		For U. S.:
vs.		Michael Q. Carey, AUSA. 791-0068
SEE REVERSE FOR THE NAMES OF DEFENDANTS.		
 For Defendant:		

STATISTICAL RECORD (07)	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISP.
J.S. 2 mailed	Clerk				
J.S. 3 mailed 3/7	Marshal				
Violation	Docket fee				
Title 21 & 18					
Sec. 846, 967 & 924(c). Consp. to import & distr. Cocaine, II. (Cts. 1&2) Use of firearm dur. commission of felony. (Ct. 3)					
Three Counts					

DATE	PROCEEDINGS
5-20-75	Filed indictment. (Superseding 74Cr1128 and referred to Cannella, J.)
5-5-75	Filed notice of readiness for trial..
5-6-75	WILLIAM ANDRIES - Filed affdvt.of M.Q.Carey,AUSA in support of a writ.. Ret.5-12-75
5-6-75	JULIAN CARRION ARCO - Filed affdvt.of M.Q.Carey,AUSA in support of a writ.. Ret.5-12-75
5-6-75	F.A.ARMEDO-SARMIENTO - Filed affdvt.of M.Q.Carey,AUSA in support of a writ.. Ret.5-7-75
5-7-75	RAMIRO ESTRADA - Filed affdvt.of M.Q.Carey,AUSA in support of a writ.Ret.5-12-75..
5-7-75	C. ESTRADA - Filed affdvt.of M.Carey,AUSA in support of a writ..Ret.5-12-75..
5-11-75	JULIAN CARRION ARCO - filed following papers,recvd. from Magistrate, true copy of warrant of removal, order fixing bail bond, waiver of removal hearing, final commitment, Temporary commitment, appearance bond....

- ۵۰۱ پاگ ۳ -

A

Docket Entries.

SCR. 429

JUDGE CANNELLA

UNITED STATES OF AMERICA

- v -

1 ALBERTO BRAVO, - 1+2
 2 GRISELDA BLANCO, - 1+2
 3 BRUNO BRAVO, a/k/a Ivan Berrio, - 1+2
 4 FRANCISCO ADRIANO ARMEDO-SARMIENTO, - 1+2
 a/k/a Eduardo Sanchez,
 a/k/a Pacho el Mono,
 a/k/a Elkin,
 a/k/a Francisco Velez,
 5 JOSE ANTONIO CABRERA-SARMIENTO, - 1-3
 a/k/a Pepe, a/k/a El Tio,
 6 EDGAR RESTREPO-BOTERO, a/k/a Omar - 1-3
 Hernandez, a/k/a El Sobrino, a/k/a
 Edgar,
 7 LEON VELEZ, - 1+2
 8 BERNARDO ROLDAN, - 1+2
 9 ARTURO GONZALEZ, a/k/a Dr. Abraham, - 1+2
 a/k/a Abraan, a/k/a Hernandez,
 10 JORGE GONZALEZ, a/k/a Jorge Arboleda, - 1+2
 11 LIBARDO GILL, a/k/a Ramiro Estrada, - 1+2
 12 RUBEN DARIO ROLDAN, - 1+2
 13 MARCONI ROLDAN, - 1+2
 14 CARMEN GILL, a/k/a Carmen Estrada - 1+2
 Restrepo, a/k/a Carmen Mazo,
 15 CARLOS MARIN, a/k/a Carlos Guarin, - 1+2
 16 BEATRICE GONZALEZ, - 1+2
 17 NINA NINO, - 1+2
 18 OSCAR PEREZ, - 1+2
 19 ERNESTO GUELLO, - 1+2
 20 JULIAN CARRION ARCO, a/k/a Gurian, - 1+2
 21 GILBERTO ROJAS, - 1+2
 22 GUILLERMO PALACIOS, - 1+2
 23 ARTURO ZAPATA, - 1+2
 24 JAMES MARIO GAVIRJA, - 1+2
 25 GABRIEL CORREA, - 1+2
 26 ALVARO CABRERA-SARMIENTO, - 1+2
 27 ANTONIO ROMERO, - 1+2
 28 ELSA CABRERA, - 1+2
 29 CESAR JULIO RIVEROS-RINCON, - 1+2
 30 WILLIAM RODRIGUEZ-PARRA, a/k/a Jairo, 1+2
 31 OLEGARIO MONTES-GOMEZ, - 1+2
 32 RAMIRO SAN COCHO, - 1+2
 33 HUMBERTO SANDOVAL, a/k/a Ramache, - 1+2
 34 ALBERTO LUIS HERRERA, - 1+2
 35 CASTON ROBINSON, - 1+2
 36 PHONDA SUE SHIRAH, - 1+2
 37 WILLIAM ANDRIES, - 1+2
 38 LUIS ESTRADA, a/k/a Chicho, - 1+2

Defendants.

B

Docket Entries.

429

FOR NOTICES OF APPEARANCE ONLY

CANNELLA, J. 75Cr.429

DATE

PROCEEDINGS

PAGE 2A

5-12-75 WILLIAM ANDRIES - Filed notice by William L. Richman 565 Fifth Ave. NYC 10017
Tel. 986-1075

5-16-75 WILLIAM ANDRIES - Filed Writ of Habeas Corpus Ad Prosequendum with Marshals return.

7-17-75 WILLIAM P. CERIOLIZZI - Mailed original CJA Copy 1 To A. O. Washington, D. C. Cannella, J.

7-17-75 WILLIAM P. CERIOLIZZI - Filed "JA. Appointment of counsel. Atty. Jacqueline Montague of 209 E ast 56th St. N.Y.C. N.Y.. Cannella, J.

Docket Entries.

29

3.

CANNELLA, J.

DATE	PROCEEDINGS
5-9-75	F.A. ARMEDO-SARMIENTO - Filed affdvt. of M.Q.Carey, AUSA in support of a writ..
5-12-75	OLCARIO MONTES-COMEZ - Filed affdvt. & notice of motion for a bill of particulars, for discovery and inspection etc
5-12-75	OLCARIO MONTES-COMEZ - Filed affdvt. & notice of motion dismissing the indictment, To inspect Grand Jury minutes, for change of venue, for severance.. Ret. 5-16-75..
5-12-75	OLCARIO MONTES-COMEZ - Filed memorandum in support of above motion..
5-12-75	WILLIAM R.-PARRA - O.M-GOMEZ - B.W. issued . Bench warrant ordered as to ALBERTO BRAVO - G.BLANCO - BRUNO BRAVO - JOSE ANTONIO SARMIENTO - BERNARDO ROLDAN - ARTURO GONZALEZ - CARLOS MARIN - GILBERTO ROJAS - GUILLERMO PALACIOS - A.ZAPATA - J.M.GAVIRJA - G.CORREA - A.C.-SARMIENTO - A.ROMERO- E.CABRERA - C.J.RIVEROS-RINCON- R.S.COCHO - H.SANDOVAL - A.L.HUMBERTO SANDOVAL - A.L. HERRERA - R.S.SHIRAM - LUIS ESTRADA "L.GILL - C.GILL - J.C.ARCO
5-12-75	Bench warrants issued as to all above named defts.. FRANCISCO ADRIANO ARMEDO-SARMIENTO - VELEZ, LIBARDO GILL, BEATRICE GONZALEZ - NINO - RUBEN D.ROLDAN - ARCO, GOMEZ, ROBINSON, ANDRIES - Atty's present... Deft's PLEAD NOT GUILTY to cts. 1 & 2 10 days for motions and to listen to tapes, Bail cont'd to all except deft Andries cont'd on ROR... P/T/C adjd to 5-20-75 Cannella, J.....
5-13-75	CARMEN GILL - Filed Affidavit & Notice of Motion for the following orders, Granting Request for Discovery, Granting Request for Bill of Particulars, etc., as indicated before Cannella, J.
5-13-75	EDGAR RESTREPO-BOTERO - Filed financial affdvt.
5-13-75	WILLIAM ANDRIES - Filed financial affdvt..
5-16-75	EDGAR RESTREPO-BOTERO - Filed order that deft is authorized to obtain the services of an Interpreter and to incur these services at the cost of the U.S... Cannella, J.....
5-20-75	J.C.ARCO - Deft. produced in Court on a writ. Atty.present.. Bail application hearing held and concluded - Bail fixed in sum of \$250,000.. Writ adjd. to 5-22-75 Cannella, J.....
5-21-75	BEATRICE GONZALEZ - Filed order that Peter J. Fabricant of 186 Joralemon St, Brooklyn, N.Y. is added to Panel of Atty's to represent deft.... Edelstein, Ch.J.....
5-22-75	P/T/C held and concluded defts and atty's present OSCAR PEREZ. Pleads not guilty to Cts. 1 and 2 Bail cont'd.- Bail limits are extended to New Jersey, Conn., Niagara Falls, Wash.D.C. and E.D. of N.Y. ERNSTO GUELLO - Atty.present.. Bench warrant ordered.. Bail forfeiture held for 2 weeks(6-5-75) Court enters N.G.plea on cts. 1 & 2. EDGAR RESTREPO-BOTERO (Atty.present) Bench warrant issued as a detainer. CARMEN GILL - Atty.present.. Writ satisfied.... As to all other defts writs adj'd sine die.. Trial on 9-16-75 at 10 a.m. R. 1306.. Cannella, J.
5-23-75	B.GONZALEZ - Filed financial affdvt. deft.
5-27-75	A.BRAVO - Mailed original CJA copy 1 to the A.O. Wash.D.C. For payment.. Cannella, J.

Docket Entries.

75 Cr 129

Cannella, J.

DATE	PROCEEDINGS
5-30-75	CSCMR VELEZ - Filed Stip & Order that between the parties hereto that bail in the amount of \$50,000.00 Personal Recognizance Bond secured by a cash deposit of \$4,000.00 or a Surety Bond in the amount of \$4,000.00 may be fixed to secure the deft's appearance to answer Indictment etc, as indicated, Cannella, J.
6-2-75	Filed Jeft's memorandum of law in opposition to Govt's motion to disqualify defense counsel....
6-3-75	R.D.ROLDAN - Mailed original CIA copy 1 to the A.O.WASH. for payment... Cannella, J.
6-3-75	N.NINO - Mailed original CIA copy 1 to the A.O.Wash. for payment... Cannella, J.
5-4-75	Filed letter dated June 3, 1975 to Cannella, J. by Francis J. Dixon... C. -
5-6-75	R.D.ROLDAN - Mailed original CIA copy 1 to the A.O.Wash. for payment... Cannella, J.
5-6-75	JORG GONZALEZ - Filed affdvt. & notice of motion to strike Govt's notice of readiness for trial, to dismiss the indictment and so forth.. Ret. 6-9-75
5-9-75	LEON VELEZ - Filed notice of motion for discovery and inspection... For a bill of particulars...
5-9-75	BEATRICE GONZALEZ - Filed affdvt. & notice of motion to dismiss indictment, to inspect G.J.minutes, for severance, for bill of particulars, discovery and inspection and suppression of statements.... Ret. 6-16-75 at 10a.m.
6-2-75	Filed memorandum of law in support of motions of deft Ruben Dario Roldan.
6-7-75	RUBEN DARIO ROLDAN. Filed Affidavit & Notice of Motion that defts will move before Cannella J. for an order Striking the Govt's Notice of Readiness for Trial dated 2-18-75 on the grounds the Govt was not ready for trial, etc, as indicated.
6-9-75	WILLIAM RODRIGUEZ - PARFA Filed Affidavit & Notice of Motion for an order dismissing indictment for unnecessary delay etc. before Cannella, on 6-16-75.
6-9-75	J.SARMIENTO - Not present and atty. not present - Writ satisfied.
6-10-75	N.NINO (Atty.present) Edward Panzer relieved as counsel. Court assigned Robert Mitchell.. Application for reduction of bail heard and denied... Cannella, J.
6-11-75	JULIAN CARRION - Filed affdvt. & notice of motion for a bill of particulars and for discovery & inspection... Ret. 6-13-75---
6-11-75	P.AYMEDIO - Filed writ of H/C Ad Pros. with marshals return.
6-16-75	G.ROBINSON - Filed motion to dismiss.
6-16-75	G.ROBINSON - Filed motion to dismiss pursuant to rule 50(h)
6-16-75	G.ROBINSON - Filed motion x for production of favorable evidence
6-16-75	G.ROBINSON - Filed motion for depositions
6-16-75	G.ROBINSON - Filed motion for leave to file additional motions.
6-16-75	G.ROBINSON - Filed motion to produce
6-16-75	G.ROBINSON - Filed motion to suppress
6-16-75	G.ROBINSON - Filed motion for severance
6-16-75	G.ROBINSON - Filed motion for bill of particulars
6-16-75	G.ROBINSON - Filed motion to adopt motions of all co-defts..

(SEE PAGE 5)

Docket Entries.

CR. 429

5.

CANNELLA, J.

D.C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date & Judge
7-7-75	P.A. ARMEDO-SARMIENTO & L. GILL-- filed defts' notice of OMNIBUS MOTION pursuant to Rule 7 (f) (F.R.C.P.).... Ret. 7-30-75.	
7-7-75	P.A. ARMEDO-SARMIENTO & GILL... filed defts' points and authorities in support of their omnibus motion.	
7-7-75	Filed transcript of record of proceedings dated MAY 12, 1975	
7-7-75	Filed transcript of record of proceedings dated MAY 14, 1975	
7-7-75	Filed transcript of record of proceedings dated MAY 17, 1975	
7-24-75	CARMEN GILL... filed deft's affirmation and notice of motion for an order to controvert the Warrant and to Suppress the alleged evidence... Ret. 7-24-75	
7-28-75	Filed Order.. the United States Attorney is hereby directed to file all answering memoranda in this case by 8-4-75. It is so ordered., Carmella, J.	
7-28-75	WILLIAM ANDRIES - Filed consent to transfer under rule 20	
8-4-75	WILLIAM ANDRIES - Filed acknowledgement xx of receipt of care in S.D.of Fla.	
8-4-75	JULIAN CARRION ARCO - Filed bond in amt. of \$11,000 by ALLEGHENY MUTUAL CASUALTY Co. Dated 7-24-75	
8-4-75	JULIAN CARRION-ARCO - Filed bond in amt. of \$127,000 by dependable Ins.Co.Inc. Dated 7-29-75...	\$112,000
8-4-75	JULIAN CARRION-ARCO - Filed bond in amt. of \$127,000 by Accredited Surety and Casualty Co. Inc.dtd.7-29-75... opposition	
8-5-75	Filed affdt. of Michael Q. Carey, AUSA in support to motions for bill of particulars, discovery and inspection, to dismiss etc.	
8-5-75	Filed Govt's memorandum in opposition to defts pre-trial motions..	
8-5-75	JULIAN CARRION ARCO - Atty. Michael Washor present... Deft did not appear. Bench warrant ordered - Bail fixed in the sum of \$1,000,000 Bail forfeiture stayed for one week(8-13-75)	
	BEATRICE GONZALEZ - Bench warrant ordered.	
	ERNESTO GUZLLO - Bench warrant ordered..	
8-5-75	J.C.ARCO) B.GONZALEZ) E.GUZLLO) Bench warrants issued..	
8-7-75	A. MING - Filed transcript of record of proceedings, dated 6-10-75	
8-7-75	D. HERNANDEZ - Filed affdt. of M.Q.Carey, AUSA in support of a writ. Ret. Bell 75	
8-11-75	FELIXISCO A.A.-SARMIENTO) Filed deft's reply memorandum of law. LIBERDO GILL)	
	(See page # 6-- over)	

Docket Entries.

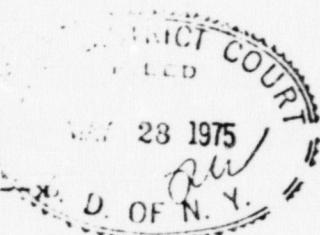
75 CR. 429

.6.

CANNELLA, J. 75 CR. 1

DATE	PROCEEDINGS	Date Ord Judgment
8-13-75	EDGAR RESTREPO-BOTERO— filed affirmation and notice of motion for an order controverting eavesdropping and wiretap orders, bill of particulars, dismiss Counts 1 and 2 and severing Count 2 from Count 1., etc.	
8-13-75	EDGAR RESTREPO-BOTERO— filed deft's points and authoirties in support of his omnibus motion.	
8-13-75	JORGZ GONZALEZ - Filed motion to dismiss the indictment for want of prosecution Ret. 8-25-75....	
8-14-75	CARMEN GILL - Filed affdvt.of M.Q.Carey,AUSA in opposition to motions for bill of particulars, discovery,to dismiss etc...	
8-29-75	FRANCISCO ARMEDO & RAMIRO ESTRADA Filed affdvt of Michael Q. Carey AUSA at the request of the court to supplement the affdvt of Seymours Detsky and in support of the govt's motion to disqualify the law firm of Kassner & Detsky.	
8-29-75	Filed affdvt of Seymour S. Detsky dated 8-25-75.	
8-29-75	Filed memorandum of law in support of govt's motion to disqualify counsel for defts ARMEDO & GILL.	
8-29-75	Filed Memorandum decision and order #43014 the Govt's motion to disqualify the law firm of Kassner & Detsky from further representation of L.Gill and F.A.Armedo-Sarmiento is hereby GRANTED and firm is relieved as counsel.....The deft's and a representative of the firm of Kassner & Detsky are hereby ordered to appear before the Court on Sept.2,1975 at 9:30 a.m. in Courtroom 1306.....Cannella,J., mailed notices....	
9-3-75	JULIAN CARRION-ARCO - Filed Govt's affdvt.& notice of motion for judgment of default on forfeiture of appearance bond....Ret. 9-9-75	
9-3-75	FRANCISCO ADRIANO ARMEDO-SARMIENTO LIBARDO GILL - Filed notice of appeal from order of Cannella,J., dated 8-29-75...Copies given to U.S.ATTY'S OFFICE to F.A.A.Sarmiento at Mens House of Detention Riker's Island East Elmhurst,N.Y. and Libardo Gill C/o Metropolitan Correctional Centre 50 Park Row NYC	
5-11-75	Filed W.H.C for Francesca Adriano Armando-Sarmiento	
5-17-75	Filed CJA appointment of Jacqueline Montague	
5-16-75	Filed W.H.C for William Adriano	

1 JGjw Transcript. 1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 -----
5 UNITED STATES OF AMERICA



6 v. 74 Cr. 1128
7 OMAR HERNANDEZ, :
8 Defendant.

9 -----x
10 March 21, 1975
11 2:30 P.M.
12

13 B E F O R E :

14 HON. JOHN M. CANNELLA,
15 District Judge.

16
17 A P P E A R A N C E S :

18 PAUL J. CURRAN, ESQ.,
19 United States Attorney for the
Southern District of New York
20 MICHAEL Q. CAREY, ESQ.,
Assistant United States Attorney

21 PAUL WARBURGH, ESQ.,
22 Attorney for the Defendant

23 ALSO PRESENT:

24 IRVING COHEN, ESQ., Attorney for Renee Rondinelli
EMANUEL MOLOFSKY, ESQ., Attorney for Carmen Caban
25 ANITA ZEVALLOS, Spanish Interpreter

1 jgjw

2 MR. CAREY: Government ready.

3 MR. WARBURGH: Defendant ready.

4 MR. CAREY: Your Honor, your Honor requested
5 that the government have --

6 THE COURT: Yes. This is the case where
7 we were talking about a possible conflict of interest.

8 What conclusion have you come to on it?

9 MR. WARBURGH: As your Honor may recall,
10 the last time we appeared, I think on Wednesday, you
11 directed that the defendant be present and also the
12 witnesses be present.

13 THE COURT: That's right, yes.

14 MR. WARBURGH: We arrived at no really
15 conclusion here. The only thing I can suggest is what
16 I suggested before: that there would be no conflict if
17 these witnesses waive their privilege. If they don't
18 waive their privilege, there will be a conflict.

19 One of the witnesses is here now and I
20 guess the Court can inquire as to what their intention
21 is.

22 MR. CAREY: Your Honor, two witnesses are
23 here today, though not in the courtroom, one is in the
24 witness room, and they are not friendly with each other.
25 A third witness, I am informed, is a fugitive and therefore

1 jgjw

3

2 cannot be made available today.

3 THE COURT: Let me ask you, when do you
4 intend to move this case?5 THE LAW CLERK: It is scheduled for the
6 31st, Judge.7 MR. CAREY: I would like to direct my attention
8 to that in a moment. But I have spoken today, in the
9 presence of a Spanish speaking agent, with each of the
10 witnesses who are here, Gloria Caban and Rita Ramos,
11 and they indicated they would not be willing to waive
12 their attorney-client privilege. The Court may inquire,
13 through its Spanish speaking interpreter, present in
14 court at the government's request, of the witnesses, if
15 the Court is not satisfied with my representation. But
16 that is what they indicated to me.17 THE COURT: I don't see why that is really
18 necessary, although I suppose since they are here we
19 could make a record of it.20 MR. WARBURGH: I just wanted to ask Mr. Carey
21 one thing.22 Were their attorneys present at the time
23 you discussed the matter with them?24 MR. CAREY: Their attorneys were not present,
25 your Honor.

1 jgjw

2 THE COURT: Do they have attorneys?

3 MR. CAREY: Yes, each of them do. May I
4 correct something I said earlier first?5 I identified one of the persons before as
6 Gloria Caban. She is a fugitive. The two people who
7 are present in court today are Carmen Caban and Rita
8 Ramos. Each of them is represented by counsel.9 This morning when I spoke to them they did
10 not have counsel present.11 THE COURT: Well, have they consulted
12 counsel?13 MR. CAREY: With respect to this question,
14 I don't think so, your Honor.15 MR. WARBURGH: I think it is incumbent that
16 they talk with their attorneys because it would appear
17 to me that of course the government would probably request
18 that they not waive their privilege because that would
19 permit me to cross examine them concerning facts that
20 probably only I know, and I may point out to the jury
21 in this case that they are testifying with the under-
22 standing of receiving certain benefits and also some of
23 the information that they may have told the government
24 may be inconsistent with what I know, and it might be
25 the government's position that they should not waive

1 jgjw

2 their privilege.

3 MR. CAREY: It is the government's position.

4 We were in a position to advise each of the witnesses
5 that we would not want them to waive their privilege
6 and I believe we did indicate that. We did not advise
7 them, nor did we purport to advise them, of their rights.
8 We simply said that they had a right to remain --

9 THE COURT: Call the one that is in the
10 courtroom now.

11 MR. CAREY: Ms. Caban.

12 THE COURT: Would you step up, please?

13 MR. CAREY: Ms. Zevallos, would you please
14 act as interpreter?

15

16 C A R M E N C A B A N , called as a
17 witness, being first duly sworn, was examined
18 by the Court through the Spanish interpreter
19 and testified as follows:

XXX

20 BY THE COURT:

21 Q Do you have a lawyer?

22 A Yes. But he is not here now.

23 Q What is the lawyer's name?

24 A Franklin Gould.

25 MR. CAREY: I believe that is Gould, G-o-u-l-d.

1 jgjw

Caban

6

2 Q When did you last speak to him?

3 A About a month ago, sir.

4 THE COURT: Where is Mr. Gould's office?

5 MR. CAREY: I believe it is nearby here,

6 your Honor. Your Honor might inquire whether Mrs.

7 Caban spoke to an associate of Mr. Gould by the name of
8 Mr. Molofsky.9 Q Did you speak to anybody in Mr. Gould's
10 office?

11 A Yes, with a representative of his on Wednesday.

12 Q This past Wednesday?

13 A Yes.

14 Q Did you talk to him about whether or not
15 you are willing to give up your attorney-client relation-
16 ship in this particular case so that this lawyer here
17 could represent this particular defendant?

18 A I did not speak about that with him.

19 THE COURT: All right. Find out if Mr.
20 Gould is available and have him come over here.

21 You may sit in the back, please.

22 MR. CAREY: Ms. Zevallos, would you ask Mrs.
23 Caban if she knows Mr. Gould's telephone number?

24 THE INTERPRETER: Yes, she knows it.

25 MR. CAREY: Would you give it to me, please?

1 jgjw

2 (Pause)

3 MR. CAREY: Your Honor, shall I call in the
4 courtroom?5 THE COURT: Wait a minute. Bring the other
6 person out first.

7 Please sit in the back.

8 BY THE COURT:

9 Q What is your name?

10 A Renee Rondinell.

11 THE COURT: By the way, is there any question
12 about the interpreter being able to translate this language?
13 Does anybody object?

14 MR. WARBURGH: No. I don't object.

15 MR. CAREY: No, your Honor.

16 THE COURT: Would you give your name for
17 the record, too, so we know who you are?

18 THE INTERPRETER: Anita Zevallos.

19 THE COURT: And what is your connection
20 with this case? Who brought you here and who do you
21 ordinarily work for?22 THE INTERPRETER: I am generally called on
23 cases for the U.S. Government, sir.24 THE COURT: And are you a certified inter-
25 preter?

1 ggjw

Rondinell

8

2 THE INTERPRETER: Yes, your Honor.

3 THE COURT: All right.

4 BY THE COURT:

5 Q Have you a lawyer?

6 A Not that I know of.

7 Q Have you ever had a lawyer?

8 A Yes, sir.

9 Q What is your lawyer's name?

10 A Irving Cohen.

11 THE COURT: Do you know who Mr. Cohen is?

12 MR. CAREY: No, I don't, your Honor.

13 Q Was he assigned to you by the Court or did
14 you hire him yourself?

15 A The Court, your Honor.

16 THE COURT: He must be a Justice Act lawyer.

17 See if he can be brought down here, too.

18 I'll suspend until we find out whether the lawyers can
19 come down here. And if Mr. Cohen can't be located, I
20 ask that the Legal Aid be directed to send a lawyer
21 up.

22 (Recess)

23 THE COURT: We'll call the lady I originally
24 spoke to --

25 MR. WARBURGH: Judge, I just wanted to

1 jgjw

9

2 note on the record that prior to the witnesses' counsel
3 interviewing them Mr. Carey went into the interview room
4 with counsel, obviously to have some type of discussion
5 with the witness and their attorney. I was not asked
6 to go in with them. I don't know what took place in
7 there. I think it is improper, it was improper, and
8 I would ask Mr. Carey at this time to disclose on the
9 record what occurred each time he went in with respect
10 to witnesses and their attorneys.

11 On the last occasion, when Carmen Caban's
12 attorney went in, Mr. Carey was accompanied by this
13 gentleman here, who I believe to be a special agent of
14 the Drug Enforcement Administration. They were in there
15 for several minutes.

16 THE COURT: I decline the application. I
17 make a note on the record that that is what your state-
18 ment of what happened is. My answer to that is very
19 simple.

20 If these people ever appear as a witness,
21 you'll have every opportunity to go into every detail
22 of it, every detail of it. And this is premature at
23 this time and I see no relevance whatsoever to what is
24 before me, whether or not you should continue on in the
25 case.

1 ggjw

2 Call up Caban.

3 Exception to you and to your client.

4

5 C A R M E N C A B A N , was examined
6 further through the interpreter as follows:

7 THE COURT: Do you represent her now?

8 MR. MOLOFSKY: Well, no. I was called by
9 Mr. Carey because I was at one or two interviews for
10 Mr. Franklin Gould, who is the attorney of record. I
11 am his associate, a friend of his and occasionally I
12 cover for him.

13 THE COURT: Are you on the Justice Panel?

14 MR. MOLOFSKY: No. But I have tried many
15 cases in this court. We never signed up for the Panel.
16 We tried cases here but we never were --

17 THE COURT: You know that before the Panel
18 came into existence we ordinarily assigned lawyers who
19 many times served pro publico bono.

20 MR. MOLOFSKY: Yes.

21 THE COURT: And I would ask you at this time
22 are you willing to serve in the same capacity?

23 MR. MOLOFSKY: Yes, I am.

24 THE COURT: All right.

25 MR. MOLOFSKY: Just to keep the record straight,

1 jgjw

Caban

11 .

2 if you don't mind, your Honor, I did speak to Ms. Caban.
3 I informed her --

4 THE COURT: We'll go into that. I want to
5 make sure that there is an attorney-client relationship
6 between you and her so that there be no question about
7 it.

8 BY THE COURT:

9 Q Ms. Caban, did you talk to this lawyer?

10 A Yes, your Honor.

11 Q And are you satisfied to have him as your
12 lawyer?

13 A Yes, your Honor.

14 Q Have you had sufficient time to talk to him
15 and explain to him your feeling in this matter?

16 A Yes.

17 Q Did you talk to him through the interpreter?

18 A Yes, your Honor.

19 Q Do you understand any English at all?

20 A Very little, your Honor.

21 Q Very little. All right. Go ahead, Mr.
22 Molofsky.

23 MR. MOLOFSKY: Your Honor, I informed her
24 who her attorney was and I was his associate and I did
25 speak to her more than once in state court and I did once

1 jgjw

Caban

12 .

2 act in her behalf in a conference. I would say more
3 than once.

4 I informed her I could not reach Mr. Gould
5 and with her permission, and I know I would get Mr. Gould's
6 permission, would she listen to me and take me as counsel
7 for this question that was put to her.

8 I explained the question to her very succinctly,
9 very clearly. I asked if she understood it more than
10 once. She informed me she understood it. She understands
11 the point about privilege and she says to me right now
12 that she will not waive her privilege of lawyer-client
13 relationship.

14 THE COURT: Ms. Caban, would you waive your
15 privilege of attorney-client relationship for the lawyer
16 that is sitting with the defendant here -- I don't
17 remember your name, counselor?

18 MR. WARBURGH: Paul Warburgh.

19 THE COURT: Representing?

20 MR. WARBURGH: Omar Hernandez.

21 THE WITNESS: Yes, I don't want to answer
22 anything about it.

23 Q And you do not give up your privilege?

24 A Yes, I do not want to give it up.

25 THE COURT: All right.

1 jg jw

13

2 The other person, please. Thank you.

4 RENEE RONDINELL, called
5 as a witness, was examined through the interpreter
6 as follows:

7 THE COURT: Mr. Cohen, you were kind enough
8 to come over here this afternoon. Thank you very much
9 to start with.

10 Did you represent this lady at one time?

11 MR. COHEN: Yes, I did.

THE COURT: Was it a private matter?

13 MR. COHEN: No. It was an assigned case.

THE COURT: Are you on the Justice Act?

15 MR. COHEN: Yes.

16 THE COURT: You are assigned at this time
17 to this particular person for the purpose of this hearing
18 and in any other legal question which arises out of this
19 question. And we will sign the necessary papers.

20 MR. CAREY: May I move at this time that
21 Mr. Cohen also be assigned to represent Ms. Rondinell
22 throughout the proceedings?

THE COURT: That is what I said.

24 MR. CAREY: In connection with the trial.

25 THE COURT: Whatever comes out of this.

1 jgjw

Rondinell

14 .

2 I am making this an omnibus assignment. So whatever work
3 you do on this, you will make your claim under the
4 Justice Act.

5 BY THE COURT:

6 Q Ms. Rondinell, do you know this gentleman
7 alongside of you here?

8 A Yes.

9 Q Do you speak English at all?

10 A A little, yes, sir.

11 Q You would rather speak Spanish.

12 A Yes, of course.

13 Q Do you accept him as your lawyer at this
14 time?

15 A Yes, your Honor.

16 Q Are you satisfied with him?

17 A Yes.

18 Q Have you had an opportunity to talk with
19 him and to explain to him and to hear from him what the
20 various matters concerned here are?

21 A Yes, your Honor.

22 Q You have been asked to give up your attorney-
23 client relationship with the lawyer sitting at the table.
24 You've got to forgive me with these names.

25 MR. CAREY: That is Mr. Warburgh.

1 jgjw

Rondinell

15

2 Q Mr. Paul Warburgh. You've been asked to
3 give up your attorney-client relationship with Mr. Paul
4 Warburgh.

5 Do you consent to do that or do you refuse
6 to do that?

7 MR. COHEN: Was he in the firm of Desky?

8 THE COURT: Yes.

9 MR. COHEN: That is the first time I hear
10 of this name.

11 THE COURT: The law firm of --

12 MR. WARBURGH: Kassner and Desky.

13 Q And he is a member of the firm of Kassner
14 and Desky, which at one time represented you.

15 A Yes.

16 Q Are you willing or do you want to give up
17 the right you have to insist on the attorney-client
18 relationship?

19 A I don't want to be asked about anything in
20 respect to what I spoke to them about.

21 Q All right. And then, as I understand that
22 answer, what you are saying is you do not want to give
23 up your attorney-client privilege that you have.

24 A I want to keep silent about it.

25 Q Yes. And you want to retain your attorney-client

1 ggjw

Rondinell/Caban

16

2 relationship?

3 A Yes.

4 Q Is this a judgment you made yourself?

5 A Yes, your Honor.

6 Q Were you forced or threatened by anybody
7 into making this judgment?

8 A No. It was explained to me.

9 THE COURT: That young lady, Ms. Caban,
10 would you come up again.

11 BY THE COURT:

12 Q Ms. Caban, were you forced or threatened
13 by anybody into insisting on your attorney-client relation-
14 ship?

15 A (Through the Interpreter) No.

16 Q Are you doing it of your own free will?

17 A Yes, your Honor.

18 THE COURT: All right. Thank you very much.

19 MR. COHEN: May I make a statement for the
20 record, Judge?

21 THE COURT: Yes, Mr. Cohen.

22 MR. COHEN: I spoke to Ms. Rondinell in the
23 hearing room outside of Mr. Carey and the marshal. I
24 explained the difference --

25 THE COURT: You mean you were in there alone

1 jgjw

17

2 with her?

3 MR. COHEN: Alone with her and the interpreter.
4 First I spoke to her in English. She does
5 understand some. Then I requested that the Spanish
6 interpreter come in. And we thereafter went into the
7 question with the Spanish interpreter.

8 I explained to her fully what the waiver of
9 privilege is and claiming of privilege. It was explained
10 to her on several different occasions. I did not impose
11 my will on her, nor did the interpreter impose her will
12 on her, and the decision and choice was strictly hers.

13 THE COURT: All right. Well, of course,
14 he doesn't have to accept that. He can explore that at
15 the proper time.

16 MR. COHEN: For my own sake.

17 MR. MOLOFSKY: Judge, for the record, I was
18 brought down, not being fully knowledgeable about the
19 trial that Ms. Caban had in the state court. I was in-
20 formed in the hearing room over there by Mr. Carey the
21 purpose why he brought me down because he could not reach
22 Mr. Gould. He knows that I am associated with Mr. Gould,
23 we share the same suite, although we are not partners,
24 and he asked me just to go in there and explain the
25 right of privilege, of a privilege between lawyer and

1 jgjw

2 client relationship. He then left and solely from that
3 point on there was only three people in that office,
4 that was the interpreter, myself and Ms. Caban.

5 THE COURT: What is amusing me is that you
6 granted the application of the defendant to find out
7 what went on in there and you overruled me. That's all
8 right. I don't mind that at all.

9 MR. MOLOFSKY: I would not like to be called
10 six months from now to try to recall after maybe trying
11 ten or twelve different cases and interviewing 150
12 clients and say what happened that day at 4:00 o'clock
13 in the afternoon. I would not recall. All I would
14 recall is that I did speak to the client.

15 THE COURT: Unless either one of you wouldn't
16 say anything further --

17 MR. MOLOFSKY: Nothing, thank you.

18 MR. COHEN: Excepting that in view of the
19 fact that I am to be in on these proceedings throughout
20 the proceedings, I would like to get notice from the
21 United States Attorney's Office as to the time the trial
22 is set.

23 THE COURT: The case will be on the follow-
24 ing Monday, the 31st.

25 MR. MOLOFSKY: That raises an interesting

1 jgjw

2 question, your Honor. Where do I stand?

3 THE COURT: You stand in the same position.

4 But that will be subject to call. When she becomes a
5 witness, if she does, we'll get in touch with you. But
6 we'll advise you ahead of time as to what is happening.

7 MR. MOLOFSKY: The reason I asked is either
8 myself or Mr. Gould. I know Mr. Gould is starting a
9 homicide on the 31st and I'm pledged to start an 8-felony
10 in Queens on the 31st in the state court.

11 THE COURT: All you have to do is advise
12 her. You don't have to be physically present here, as
13 long as she has the advice of counsel.

14 MR. MOLOFSKY: Fine, your Honor.

15 THE COURT: But we'll come to that when we
16 come to it.

17 MR. COHEN: Because on that day I too will
18 be in the hospital, just for the day.

19 THE COURT: All right. We'll work in such
20 a fashion to see if we can do it at a time when it is
21 convenient for you to be here.

22 MR. COHEN: Very good, sir.

23 THE COURT: To move on the application made
24 by the defendant that he not be recused from this case,
25 if that language is applicable to a lawyer, in other words,

1 jgjw

2 be disqualified, I find that under the cases the fact
3 that these two prospective witnesses declined to waive
4 their privilege -- their attorney-client privilege, that
5 the lawyer and the firm cannot continue in this case.

6 I make this ruling not only upon what's
7 happened here today, namely that these two prospective
8 witnesses have indicated not only to themselves but to
9 the lawyers, who have been kind enough to assist the
10 Court, that they do not desire and they will not waive
11 their attorney-client privilege but also upon the fact
12 that as I see it this would be a violation of the Code
13 of Ethics.

14 From the discussion that has been had so
15 far, it is possible that Mr. Warburgh or some member of
16 the firm would be a witness in the case, and under the
17 circumstances I rule additionally, in addition to the
18 ground that I have already stated, that because of this
19 possibility and because the Code of Ethics are very
20 distinct on this -- I don't have the specific section
21 at this time, but I've seen the section -- I therefore
22 use that also as a basis for the fact that this lawyer
23 and this firm is disqualified in this case.

24 Is the interpreter here?

25 THE INTERPRETER: Yes, your Honor.

1 ggjw

Hernandez

21

2 THE COURT: For the benefit of the defendant,
3 will you take your place there?

4 BY THE COURT:

5 Q You are Omar Hernandez?

6 A (Through the Interpreter)

7 Yes.

8 Q Mr. Hernandez, do you understand English at
9 all?

10 A No, your Honor.

11 Q Well, you understood my question, because
12 you answered no.

13 A Yes, your Honor. I am studying English,
14 your Honor.

15 Q So you understand poco, a little English.

16 A Yes.

17 Q How long were you here?

18 A Before I was arrested I have been here
19 twelve years and then one more year now since I have
20 been arrested.

21 Q So you've been here three years?

22 A Yes.

23 Q Before you were arrested, what kind of work
24 did you do?

25 A I worked in a beauty parlor run by a Luis

1 jgjw

Hernandez

22

2 Morales.

3 Q Did that beauty parlor have only Spanish
4 customers or did you have English customers too, English
5 speaking customers?

6 A No. Both, your Honor.

7 Q How did you talk to the people that speak
8 English?

9 A Because Mr. Morales speaks English and Spanish
10 and he would --

11 Q He acted as the interpreter? All right.

12 Your lawyer has been disqualified in this
13 case because of the fact that I have held as a matter
14 of law that he cannot represent you because of knowledge
15 which was gained about two witnesses in the case and
16 therefore you are now in a position of needing a lawyer.

17 Do you have any other lawyer in mind at
18 this time?

19 MR.WARBURGH: Judge, if I can just interrupt
20 for a minute, I discussed the possibility of the Court's
21 decision with Mr. Hernandez before appearing here this
22 afternoon, and I indicated to him that if your Honor's
23 decision was that I be disqualified, I feel that I owe
24 him a duty to attempt to find an attorney --

25 THE COURT: I would be very happy if you

1 ggjw

23

2 would help him.

3 Can you report on Wednesday what progress
4 you have made?5 MR. WARBURGH: Yes, your Honor. However,
6 the trial is set for the 31st.

7 THE COURT: I understand that.

8 MR. WARBURGH: And I had hoped to be able
9 to talk with Mr. Hernandez at West Street this evening.
10 However, because of certain administrative problems they've
11 declined to grant my request.12 THE COURT: You can still talk to him here.
13 You can talk to him here.14 MR. WARBURGH: I've arranged to have an
15 interpreter that my office uses to interpret for me,
16 because I realize this young lady here is a government
17 interpreter.18 THE COURT: I am sure that she will assist
19 you and the Court in this particular. It shouldn't
20 take too long now. It is ten after 4:00. If you proceed
21 directly to the marshal's office, you should be able
22 to get that done in short order.23 MR. WARBURGH: There is another factor
24 that I have to explore with Mr. Hernandez, and I feel
25 that this interpreter would be put in a compromising

1 jgjw

2 situation.

3 THE COURT: What do you suggest?

4 MR. WARBURGH: I suggest that the Court ask
5 the marshals to keep him here after 5:00 o'clock to
6 give my interpreter a chance to get here and discuss
7 this matter with him. If not, I'll have to do it sometime
8 on Monday or so, which is going to inconvenience the
9 Court and the attorney if there is a request made
10 that the trial be continued.

11 THE COURT: Where is the marshal?

12 It is possible this man will get over
13 earlier, isn't it, counsel? If you call him now, can
14 you get him here earlier?

15 MR. WARBURGH: She.

16 THE COURT: Is it possible to get her
17 here earlier?18 MR. WARBURGH: I will call her and ask her
19 if she can come here earlier.20 THE COURT: I'll be here until 6:00 o'clock.
21 So you go out, call up and find out when you can get her
22 here and then if we are going to run past 5:00 o'clock
23 let me know. I'll be in my chambers and I'll talk to
24 the marshal. Okay?

25 MR. WARBURGH: Thank you, Judge.

1 jgjw

25

2 THE COURT: All right. Fine.

3 MR. CAREY: Your Honor, one or two other
4 matters.5 Number one, the defendant by the name of
6 Montez Gomez has yet to be arraigned and I would like
7 to make an arrangement to do that sometime on Monday
8 if convenient to your Honor.

9 THE COURT: Any time on Monday. 2:00 o'clock.

10 MR. CAREY: I will have counsel present
11 at that time. I will try to determine if I can before
12 this whether or not he is indigent. I am assuming he
13 is and if so I will have Legal Aid available.14 The other matter, your Honor, is the projected
15 start of this trial. It is scheduled, as your Honor
16 knows, on March 31st. It is not apt to be essential that
17 the government have an adjournment for the start of the
18 trial. However, there is some evidence which we hope
19 to get during this week but we don't have any assurance
20 that we will have it. We might otherwise have to start
21 the trial without that evidence.22 Secondly, the government would like some
23 opportunity to discuss with counsel for Mr. Gomez whether
24 or not he, as well as newly appointed counsel for Mr.
25 Hernandez, whether or not there will be a disposition in

1 jgjw

2 this matter without trial.

3 In addition, Mr. Parra has raised a possibility
4 that there is a conflict of interest, a double jeopardy
5 problem. And I weeks ago requested from the U.S. Attorney's
6 Office in Texas, who is responsible for prosecuting
7 Mr. Parra, as well as Mr. Montez Gomez, in I believe
8 1973, for an offense committed in 1972, to send me the
9 files. I have not yet received them. We have sent tele-
10 grams through the Drug Enforcement Administration to
11 their agents in Texas with a request that they actually
12 go to the United States Attorney's Office and pick
13 these up and send these to us through a courier in some
14 fashion and we just haven't received them.

15 Part of the reason for that, I believe, your
16 Honor, is that the transcript of the plea and sentence
17 for Mr. Montes Gomez and Mr. Parra will not be transcribed
18 and approximately a week ago I spoke to the Assistant
19 U.S. Attorney in charge of that case and though we had
20 left messages earlier that we wanted that, he was out
21 ill and apparently since we don't have them I assume his
22 secretary didn't go ahead and make the necessary arrange-
23 ments.

24 All this really resolves itself in one ques-
25 tion, whether or not there will be a trial of this case.

2 THE COURT: I'll leave it on for the 31st
3 and before that you find out if you can't proceed or if
4 a lawyer makes an application, I'll entertain it.

5 MR. CAREY: Thank you.

6 THE COURT: Of course we have to talk to the
7 new lawyer anyhow. He may have some problems of his
8 own.

9

10

11

12

13

* * * * *

14

15

16

17

18

19

20

21

22

23

24

25

1 jhjp

2 AFTERNOON SESSION3 2:15 p.m.

5 MR. KASSNER: Judge, I have a small problem.
6 I don't have a translator. Our translator abandoned us.

7 THE COURT: You mean an interpreter.

8 MR. KASSNER: An interpreter.

9 THE COURT: I don't know if there is one around
10 here.

11 (Pause.)

12 MR. CAREY: Your Honor, my apologies for being
13 late. They didn't want to let me through the tunnel be-
14 cause there is a flood over there. I finally convinced
15 them. The Government is ready to proceed.

16 THE COURT: There is no interpreter.

17 MR. CAREY: Mr. Sarmiento--

18 MR. WARBURGH: We had engaged the services of
19 the interpreter for this morning and we didn't expect it
20 would be put over until this afternoon and we were abandoned
21 by the interpreter.

22 (Pause.)

23 MR. CAREY: Your Honor, while we are waiting,
24 I have a transcript of a hearing conducted before your
25 Honor on March 21, 1975 in United States versus Omar

2 Hernandez, 74 CR 1128, in which your Honor found that there
3 was a conflict in the firm of Kassner & Detsky representing
4 Omar Hernandez in that they had also represented two pro-
5 spective Government witnesses.

6 I would like this marked as Government Exhibit
7 No. 1 for the purposes of this hearing, and I draw your
8 Honor's attention to pages 12 and 15 for your Honor's
9 questions--

10 THE COURT: The interpreter is on the way up.

11 I would rather wait for the interpreter.

12 MR. CAREY: Certainly, your Honor. May we
13 have it marked for identification at this time?

14 THE COURT: No. Wait until the interpreter
15 gets here.

16 MR. CAREY: Yes, your Honor.

17 (Pause.)

18 THE CLERK: United States versus Sarmiento
19 and Gill.

20 MR. CAREY: The Government is ready.

21 THE CLERK: Defendant Sarmiento ready?

22 MR. KASSNER: The defendant is ready.

23 THE CLERK: Defendant Gill ready?

24 MR. KASSNER: The defendant is ready.

25 THE COURT: Let the record note that prior

1 jhjp

2 to this call the defendants made known to the Court that
3 they did not have an interpreter here. As I understand it,
4 the defendants are represented by private counsel, and
5 therefore the obligation is upon them to produce the
6 interpreter. We did request an official interpreter from
7 the building here to come up. She apparently has arrived.

8 Who is she hired by? She is an employee of
9 the United States Clerk's Office. Is there any objection
10 on the part of the defendants to her acting as an inter-
11 preter?

12 MR. KASSNER: No, your Honor.

13 THE COURT: Are you answering for both?

14 MR. KASSNER: Yes, I do.

15 THE COURT: All right. She is now conversing
16 with them, I would imagine, to see whether or not they
17 understand each other.

18 THE INTERPRETER: We understand.

19 THE COURT: Would you give your name for the
20 record, please.

21 THE INTERPRETER: Sylvia Aguilar.

22 THE COURT: You are employed by the Clerk's
23 Office here in this district?

24 THE INTERPRETER: Yes, I am.

25 THE COURT: Have you spoken to these defendants?

1 jhjp

2 THE INTERPRETER: Not before now.

3 THE COURT: Speak to them now.

4 THE INTERPRETER: They understand me, your
5 Honor.6 THE COURT: You are speaking in Spanish, are
7 you?

8 THE INTERPRETER: Yes.

9 THE COURT: All right. Swear her in.

10 (The interpreter was sworn.)

11 THE COURT: The Court is concerned by the
12 fact that both of these defendants are represented by the
13 same law firm. I had this problem before, as indicated by
14 these minutes which have been handed to the defendants,
15 and which are made part of the record for purposes of
16 discussion. Mark them Court's Exhibit 1.

XXX

17 (Court's Exhibit 1 marked for identification.)

18 THE COURT: I feel no differently about these
19 defendants than I did about the other defendant, Hernandez.20 I am aware of the arguments on both sides of
21 this question. I think I even wrote a memorandum on it,
22 if I am not mistaken. My thoughts are contained in these
23 minutes which have just been made a part of the record.24 I find from my reading in this area that although
25 the defendant has a right to have counsel of his own

1 jhjp

2 choosing, there are some limitations when conditions such
3 as these arise when there is possible conflict, and the
4 trouble with it is that most of the questions don't arise
5 until after conviction, and at that time the defendant
6 who pro forma said he was satisfied to have the lawyer
7 even though the lawyer represented someone else in the
8 case, invariably the Appellate Courts have frowned upon
9 that and have reversed those cases.

10 I am not in a position to see that this is any
11 exception to that rule.

12 I would let each defendant procure whatever
13 lawyer he wants to and the other defendant retain this
14 firm of lawyers, but there will have to be a separation,
15 so their interests can be properly regarded.

16 MR. CAREY: Your Honor, there is an additional
17 conflict besides the conflict of the one firm representing
18 two defendants in this case.

19 This particular firm represented two witnesses.
20 who have testified before your Honor in a related indict-
21 ment which has been superceded by the present indictment.
22 I am referring to 74 CR 1128.

23 Specifically with respect to the representation
24 by the firm of Kassner & Detsky of Omar Hernandez, your
25 Honor examined two potential witnesses for the Government,

2 each of whom had been previously represented by the same
3 firm of Kassner & Detsky. Both of those witnesses are
4 expected to testify in the upcoming trial of the indictment
5 before your Honor.

6 In addition, there is a third potential Govern-
7 ment witness, a man by the name of Michael Torres, who I
8 understand was also represented at sometime by the firm
9 of Kassner & Detsky.

10 Two of the potential Government witnesses,
11 as set forth in pages 12 and 15 of Court's Exhibit 1, stated
12 that they would not waive their attorney-client privilege
13 with respect to their representation at an earlier time
14 by the firm of Kassner & Detsky, and as a result of those
15 statements by those prospective Government witnesses your
16 Honor declared that the firm of Kassner & Detsky could not
17 represent Omar Hernandez for the trial of indictment 74
18 CR 1128.

19 Your Honor, the Government has every reason
20 to believe that the prospective Government witnesses who
21 testified before you about the conflict of interest would
22 give the same testimony if asked the same questions today,
23 that the situation has not changed, that there is now,
24 therefore, a conflict of interest in the firm of Kassner &
25 Detsky representing any defendant in this case because of

1 jhjp

2 the fact that they had previously represented potential
3 Government witnesses who are unwilling to waive their
4 attorney-client privilege.

5 For that reason, your Honor, the Government
6 requests that the Court find that there is a conflict of
7 interest based on those grounds also and that therefore
8 neither defendant presently before your Honor nor any
9 defendant in fact named in this indictment may be repre-
10 sented by Kassner & Detsky, until such time as the pro-
11 spective Government witnesses declare that they are willing
12 to waive their attorney-client privilege.

13 THE COURT: That is a great obstacle in the
14 case. I am prepared to hear you on it.

15 MR. KASSNER: Thank you, your Honor. As the
16 U.S. Attorney has indicated, there are two issues in this
17 hearing, not one. One issue is whether these two defen-
18 dants who claim they don't know each other, have never met
19 each other, are wholly unacquainted with each other until
20 the time that they hit this jail under this indictment,
21 whether they can be deprived of counsel of their choice,
22 even if it be one counsel, after being advised that they
23 are having one counsel for both of them, merely under some
24 nebulous theory of a conflict of interest which does not
25 exist, never did exist and never would exist.

1 jhjp

86

2 THE COURT: It seems to me we better get to
3 the second point first, because if the second point is
4 valid, then, of course, this would be an issue which the
5 Court would not have to reach.

6 MR. KASSNER: As to the second point, your
7 Honor--

8 THE COURT: What about that? That is the same
9 thing that happened in the other case.

10 MR. KASSNER: Not exactly, your Honor. In the
11 first case we represented the Caban sisters, who were wit-
12 nesses against Omar Hernandez, who we also represented,
13 in connection with certain things that happened in the
14 apartment of the Caban sisters which were involved in the
15 case that we represented them in.

16 What happened was the Caban sisters were arrested
17 and certain guns and narcotics were found on the premises.
18 The guns and narcotics were alleged by them to be Omar
19 Hernandez' after a while. In the first few months they
20 did not allege th... to be Omar Hernandez' and we represented
21 them. As soon as they alleged them to be Omar Hernandez',
22 and we were representing Omar Hernandez, we got out of
23 that case, out of the Caban sisters' case, and then we
24 were thrown off the Omar Hernandez case.

25 But this was all facts arising out of one

1 jhjp

2 transaction, as to which we had a privileged relationship
3 with the girls.

4 This indictment, and this will be called to
5 your Honor's attention at some future date, involves a
6 misjoinder of two conspiracies in each count. Your Honor
7 will have to rule on that at some time.

8 However, for purposes of this hearing I will
9 discuss them in terms of the Pepe and El Mono aliens.

10 Now, there are a bunch of people involved
11 allegedly in a conspiracy with Pepe and there are a bunch
12 of people involved allegedly in a conspiracy with El Mono,
13 which is the name they gave to my client, Mr. Sarmiento.
14 There is no interaction between the two groups. There is
15 obviously a misjoinder in this case.

16 Because of their own misjoinder they want us
17 to withdraw from defending these people, who are on one
18 aspect of the case, where the girls are wholly on the Pepe
19 side of the case, and we won't even examine the girls,
20 because the girls will say nothing, absolutely nothing
21 about our clients. We will not examine them. We have no
22 desire to examine them. We will certainly not divulge
23 any interest. Let the Pepe lawyers worry about those
24 girls who are going to implicate everybody on the Pepe
25 side of the case.

2 Now, if these two conspiracies are kept together I respectfully submit there will be a misjoinder,
3 it will be reversed, because there will be a horribly
4 prejudiced misjoinder in this case, a horribly prejudiced
5 verdict of misjoinder.

6
7 I will also allege that there was a horizontal
8 misjoinder, but that is neither here nor there for the pur-
9 poses of this hearing. All I know is that these girls will
10 testify as to certain facts relating to the Pepe side of
11 this case. They will say that they don't know these people,
12 never saw these people, and know nothing about my clients.
13 I will not even cross examine them. So how is there any
14 conflict of interest?

15 Now, just because the Government doesn't like
16 us on any of their narcotics cases doesn't mean our clients
17 should be deprived of counsel of their choice, which I
18 think is fundamental under the Sixth Amendment, unless
19 there is an overriding, but an overriding policy in the
20 case, and there is no policy in this case whatsoever.

21 MR. CAREY: Your Honor, first, the prospective
22 Government witnesses about which I addressed myself, to
23 whom I addressed myself earlier, will testify against each
24 separate branch, using Mr. Kassner's characterization, and
25 therefore the conflict does remain.

1 jnjp

2 In addition, Mr. Kassner's statement has given
3 the Court and the Government an additional reason to seek
4 their replacement as counsel in this particular case.

5 Mr. Kassner just stated that he would not even cross
6 examine the Caban sisters if they were to testify, the
7 other people, presumably, that he has represented earlier.

8 In that event, your Honor, I submit that on
9 appeal defendant would have a substantial Sixth Amendment
10 claim of lack of representation by counsel, if in fact
11 counsel did not represent him assiduously during the trial
12 by cross examining two of what are expected to be--or
13 more--of what are expected to be principal witnesses in
14 the case against the defendant.

15 The witnesses will testify with respect to
16 all the defendants in the case in one way or another,
17 your Honor. Nothing Mr. Kassner has said indicates that
18 there is no conflict of interest in this particular case
19 with respect to the testimony that will be given by wit-
20 nesses who were previously represented by him.

21 The Government submits that on the record
22 presently before your Honor a conflict of interest must
23 be found.

24 MR. KASSNER: I ask the U.S. Attorney a plain,
25 simple question: Will either of the Caban sisters testify

1 jhjp

2 that they know the defendants, even know the defendants,
3 leave alone have spoken to the defendants or purchased
4 anything from them or sold anything to them? Will they
5 testify that they know the defendants?

6 I ask him this question. Let him answer the
7 question.

8 MR. CAREY: This is not a discovery proceeding.
9 The Government will not even attempt to answer that ques-
10 tion.

11 MR. KASSNER: I answered your questions before
12 when you put them to me.

13 MR. CAREY: You chose to do so.

14 I choose not to answer that question, your
15 Honor.

16 MR. KASSNER: Then I think the answer speaks
17 for itself, your Honor.

18 MR. CAREY: As I have stated, your Honor, they
19 will testify in this case.

20 THE COURT: The question is not whether they
21 will testify, but whether the defendants' lawyers have any
22 knowledge which would be in effect an unfair advantage as
23 a result of them being witnesses, and if in fact they are
24 not going to testify against either defendant to having any
25 discourse or any other relationship with them, concerning

1 jhjp

2 their activities in narcotics or related areas it might
3 well be that there isn't any conflict.

4 MR. CAREY: Your Honor, if the Government's
5 witnesses, regardless of whether they ever gave any specific
6 testimony against these two particular defendants, are on
7 the stand and are cross examined by Mr. Kassner or Detsky
8 or someone else in that firm on the basis of information
9 received by them during their representation of the Govern-
10 ment's witnesses that will be in violation of the witness'
11 attorney-client privilege. The witnesses have declared
12 that they will not waive that privilege.

13 THE COURT: That may be so. He has made the
14 statement that he is not going to cross examine them and
15 I don't know that that would amount to bad representation,
16 because it might very well be that there would be nothing
17 for him to cross examine about.

18 MR. CAREY: But we will never be able to deter-
19 mine that. It will raise a question surely on appeal.
20 There is no alternative. If these defendants are con-
21 victed and they choose to be represented by some other
22 counsel on the appeal, there is no doubt in my mind that
23 any respectable defense counsel is going to grab that
24 issue as a Sixth Amendment issue and raise it before the
25 Court of Appeals.

1 jhjp

92

2 I say at this time, your Honor, it seems to me
3 it's unnecessary to risk that problem at this time.

4 The defendants knew at the time they represented
5 a wholesale lot of people in this particular conspiracy.

6 THE COURT: Wait a minute. They didn't become
7 defendants. What you are talking about is the lawyers,
8 not the defendants.

9 MR. KASSNER: Apparently he means the same
10 think, your Honor. Apparently he is indicating that we
11 are defendants in this case and that we can't represent
12 people because we have represented other people, and re-
13 gardless, by throwing 40 people into an indictment, if he
14 can deprive people in this indictment of counsel of their
15 choice, because he also throws in people as witnesses or
16 as defendants who have been represented before by counsel,
17 then the Government will continually bring these type of
18 indictments involving the entire world, a number of con-
19 spiracies, and try to make this a Federal conspiracy by
20 denying defendants counsel of their choice, and I don't
21 think that that is a negligible right that a defendant
22 has, and I don't think the fact that there are 180,000
23 lawyers in the United States means that they have to take
24 one dictated by the United States Attorney. They still
25 are entitled to counsel of their own choice, and it is much

1 jhjp

2 more important to grant them this right than to protect
3 them from the ephemeral right of a witness who won't testify
4 as to them and who the United States Attorney won't say
5 will testify as to them, but on the speculation to say
6 that they are deprived counsel of their choice.

7 THE COURT: Any time there is a conspiracy
8 any witness that testifies testifies against everybody,
9 regardless of whether they have seen them or haven't seen
10 them or anything else, and because unfortunately of the
11 broad scope of the conspiracy law that condition exists.

12 So in effect there is a duty on your part,
13 if they take the stand, to bring out anything which in
14 any way would assist your clients. That is the area that
15 concerns me really.

16 MR. KASSNER: If your Honor please, there is
17 no duty on my part to violate a confidence learned as a
18 result of an attorney-client relationship with the Caban
19 girls. That is number one.

20 Number two, I have never spoken to the Caban
21 girls, seen the Caban girls or even know the Caban girls,
22 I personally.

23 Now, it would be impossible for me to violate
24 a confidence with the Caban girls unless I discussed it
25 with people in my office who represented the Caban girls

1 jhjp

2 and went out to violate this confidence, which is something
3 I would not do. I have never represented the Caban girls,
4 seen the Caban girls--my office has--I have never seen them
5 or spoken to them. I don't know who they are.

6 It's impossible for me to violate a confidence
7 with the Caban girls and I don't know if it's possible for
8 anybody at my office to violate the confidence with the
9 Caban girls. All I know is in this particular case the
10 Caban girls will not testify against my clients. If they
11 testify against the other conspiracy on the other side
12 represented by other lawyers, I am sure the other lawyers
13 can represent these defendants much more ably than I can,
14 who have no knowledge of the facts on the other conspiracy.

15 What I am saying, your Honor, is I think there
16 will be a misjoinder in this case in the first place, so
17 the Caban girls will have nothing to do with the alleged
18 conspiracy on my clients' side, and to throw us off the
19 case on this speculation, when the United States Attorney
20 isn't even willing to say that they even know my clients,
21 I think is the height of speculation and I think will lay
22 a foundation for an appeal on the grounds of denial of
23 counsel.

24 THE COURT: I can understand both sides. Is
25 there anything further you want to say?

1 jhjp

2 MR. CAREY: Yes, your Honor. Mr. Kassner notably
3 failed to mention whether he had ever himself spoken to
4 Rita Ramos or Renee Rondinell.

17 MR. KASSNER: I place Rita Ramos in exactly the
5 same position as the two Caban sisters with respect to these
6 two defendants and I ask the United States Attorney if she
7 can even testify that she knows these two defendants.
8

9 If you are not willing to say that she can
10 testify that she even knows these two defendants I don't
11 think there is any basis for this motion in the first
12 place.

13 As to Renee Rondinell, I have approximately
14 three or four years ago represented her. After three or
15 four years ago I haven't represented Renee Rindinell.
16 Mr. Detsky in my office may have represented her two years
17 ago in a case. As soon as we found out she became a Govern-
18 ment agent we withdrew from the case she was in, and that
19 had nothing to do with these clients.

20 This conspiracy arose after we left Renee
21 Rondinell, to the best of my knowledge. All of the facts
22 of this conspiracy and the period of this conspiracy, to
23 the best of my knowledge, are after we stopped representing
24 Renee Rondinell.

25 To the best of my knowledge, that is the case,

1 jhjp

2 but I am not sure about that. All I know is that my
3 clients and Renee Rondinell don't know each other, unless
4 the U.S. Attorney is willing to tell me otherwise, and if
5 he tells me otherwise, I will reconsider my position.

6 But I don't see why they should be denied
7 counsel of their choice on a mere speculation that I
8 might want to cross examine some of his witnesses on tes-
9 timony which has nothing to do with my clients.

10 MR. CAREY: Your Honor, I believe your Honor
11 correctly analyzed before that because this is a conspiracy
12 case the testimony of any Government witness can be taken
13 by the jury against any defendant.

14 THE COURT: Why were these two joined together?
15 I thought Judge Pollack had spoken to you and to the
16 Government people and asked you to do something about these
17 indictments.

18 It seems to me they wound up worse than they
19 did before.

20 MR. CAREY: Your Honor, what in effect has
21 happened in this indictment is that the Government has
22 substantial evidence to indicate that this was one con-
23 spiracy, not two. It has dropped the Pinkerton charges
24 to simplify the indictment. It has substantial evidence
25 that these particular defendants were conspiring to

1 jhjp

2 97

2 distribute marijuana, and without that charge in the indictment these defendants, considering that a lot of the Government's case would be based on codes, could each take the stand and exculpate themselves from a conspiracy to distribute cocaine by saying yes, they conspired to distribute marijuana, and the jury will be compelled to acquit them if they in fact found a reasonable doubt in the Government's case.

10 So it was absolutely necessary that a count involving a conspiracy to distribute marijuana be added to this indictment because the evidence shows that.

11 In addition, there are not any Pinkerton charges in this indictment, which there were in the other indictments, I think three or four counts. Because the Court of Appeals disapproves of the Pinkerton theory of guilt the United States Attorney's Office decided to drop those charges. There is substantial evidence linking the people with--one, for instance, of the Government's witnesses, Carmen Caban, was intimately familiar with--with those Mr. Kassner has characterized as being in the El Mono side of the conspiracy.

12 The Government believes now that it can easily show that there was not a misjoinder in this case. In any event, that is something which will be raised at another

1 jhjp

2 time, and if the Court finds that there is an improper
3 joinder it can order a severance. If there is a severance
4 and if, indeed, at that time certain Government witnesses
5 who the Government now says will testify against these
6 defendants should not be necessary to testify in those
7 cases then Mr. Detsky is free at that time to represent
8 any defendant and they are free to choose him.

9 In any event, the defendants are not denied
10 by a finding that there is a conflict of interest in this
11 case from having counsel of their choice. Mr. Sarmiento
12 has been able to raise enough money to hire Kassner &
13 Detsky as his attorney. He will certainly be able to
14 take that money and hire some other counsel.

15 Mr. Libardo Gill, who has had sufficient funds
16 to hire Kassner & Detsky, presumably for the whole trial,
17 will have sufficient funds to hire someone else to repre-
18 sent him for the duration.

19 There are 25,000 attorneys I am told in New
20 York City. I am sure that they can find some attorney
21 in New York City other than Kassner & Detsky who will not
22 raise a question of conflict of interest in a possible
23 violation of their client's Sixth Amendment rights by
24 failure to cross examine Government witnesses who testify
25 against them in this city.

1 jhjp

99

2 Your Honor, they have not stated, and I think
3 this is the clearest argument against their present posi-
4 tion, at the time this entire issue was considered with
5 respect to the defendant Omar Hernandez, who remains a
6 defendant in this case, your Honor, they did not raise
7 these problems then, they agreed at that time that there
8 was a conflict of interest. There was no objection.

9 Your Honor has Court's Exhibit 1 to examine
10 to see if there was any objection at that time to your
11 Honor's determination that there was a conflict of in-
12 terest.

13 Omar Hernandez is a defendant in this case.
14 The case against him is substantially the same. The case
15 against these defendants is substantially the same. It
16 would be inconsistent, your Honor, to have found with
17 respect to their representation of Omar Hernandez that
18 there was a conflict of interest and to find at this time
19 with respect to the representation of Libardo Gill and
20 Francisco Armedo-Sarmiento that there was not a conflict
21 of interest.

22 I submit, your Honor, that the time to raise
23 these questions, vague as they are, about not really having
24 a recollection now of current matters that they could
25 question the Government's witnesses on, should have been

1 jhjp

100

2 raised, if they were legitimate, and I submit that they
3 are not, should have been raised at the time the hearing
4 was had on the conflict of interest with respect to Omar
5 Hernandez.

6 In any event, your Honor, these witnesses will
7 testify against these particular defendants. Their testi-
8 mony will be substantial, it will be important with respect
9 to the jury's determination of the innocence or guilt of
10 these particular defendants, as it will with respect to the
11 innocence or guilt of all of the defendants. They are not
12 insubstantial, insignificant witnesses, with respect to
13 whom these counsel should waive their cross examination,
14 which is what they would have to do if they were not to
15 violate their attorney-client privilege with respect to
16 matters which clearly go to the impeachment of the Govern-
17 ment's witnesses, namely, their prior criminal acts, with
18 respect to which these defense counsel are intimately
19 familiar.

318 20 There are not only the two Caban sisters,
21 your Honor. There is Michael Torres and there is Rita
22 Ramos and Renee Rondinell, who Mr. Kassner has just ad-
23 mitted he did personally examine himself. But whether he
24 had or not, whether someone else in his firm had personally
25 examined these people, nevertheless, they were represented

1 jhjp
2 by the firm of Kassner & Detsky, and with respect to that
3 representation the knowledge of one partner is the knowledge
4 of all partners, the knowledge, I submit, of one associate
5 may be considered the knowledge of all associates, and
6 whether these particular attorneys spoke to these respective
7 Government witnesses in person is immaterial.

8 The fact is they represented them. The defen-
9 dants will not waive their attorney-client privilege.

10 On those grounds, the Government submits that
11 this Court should find that the representation by Kassner &
12 Detsky of Francisco Sarmiento and Libardo Gill constitutes
13 a conflict of interest.

14 MR. KASSNER: If your Honor please, I don't
15 really understand the basic point that he made of some
16 sort of waiver doctrine wherein the case of Omar Hernandez
17 we didn't do something that he thinks we should have done
18 and we conceded there was a conflict so we withdrew from
19 the case.

20 First of all, I don't believe we conceded a
21 conflict at that time. Second of all, that was not this
22 case. It was a substantive case a year ago. Third of all,
23 Omar Hernandez was involved with the Caban girls to the
24 extent that they testified that he left guns and narcotics
25 in their apartment. I don't understand what this has to

1 jhjp

102

2 do with my clients.

3 I respectfully submit that the U.S. Attorney
4 still hasn't been sufficiently candid with this Court to
5 say outright to this Court whether these four people he
6 named--first of all, I never heard of Michael Torres. Our
7 office never represented Michael Torres. I never heard of
8 Michael Torres. I don't understand what he is talking
9 about with a Michael Torres.

10 So that is the end of Michael Torres. If our
11 office represented Michael Torres I didn't know about it.

12 Now, I discussed our connection with the Caban
13 girls and with Rita Ramos. I stated categorically that
14 I did not believe the U.S. Attorney had witnesses that
15 we ever represented that even knew our defendants in this
16 case. I stated that categorically. I have yet to hear the
17 U.S. Attorney state categorically that any of the witnesses
18 that he claims we represented even knows these defendants.
19 Forget' about testifying as to narcotics dealing, but even
20 knows them.

21 Now, under those circumstances I cannot con-
22 ceive of why these people should be asked to choose among
23 the other 60,000 lawyers in New York State and take a
24 choice of a second choice or a third choice as opposed to
25 the counsel they did in fact choose, they do in fact have

1 jhjp

103

2 confidence in, and they do in fact want to try this case.

3 It is inconceivable to me that the U.S. Attor-
4 ney's interest in our not representing these defendants is
5 greater than their interest in having us represent them.6 MR. CAREY: Your Honor, I would like to clarify
7 two things.8 One, the firm of Kassner & Detsky represented
9 Omar Hernandez with respect to an indictment and during a
10 trial which was completed I believe approximately one year
11 ago and it is not with respect to that representation that
12 your Honor found that there was a conflict of interest.13 Your Honor found that there was a conflict of interest with
14 respect to their representation of Omar Hernandez in the
15 indictment 74 CR 1128, which is substantially the charges
16 against Omar Hernandez which are contained in the present
17 indictment.18 Secondly, Mr. Paul Warburgh had a conference
19 with me in my office on February 12, 1975, in which he asked
20 are Gloria and Carmen Caban, Rita Ramos, Michael Torres and
21 Carlos Martinez, a name of an individual whose name hasn't
22 previously come up today, going to be Government witnesses.
23 He stated at that time--I am reading now from my notes,
24 which are not verbatim--he said if so Kassner & Detsky may
25 have to withdraw since they once represented the above,

1 jhjp

2 with the exception of Michael Torres, but Mr. Warburgh
3 explained that Michael Torres acted as an interpreter in
4 conferences with Carlos Martinez.

5 Your Honor, I just wanted to clarify where
6 my information came that Michael Torres was one of the
7 witnesses with respect to whom there may be a conflict of
8 interest.

9 I submit that Mr. Warburgh has given a further
10 reason why there is a conflict of interest in this particu-
11 lar case in addition to those offered by the Government.

12 MR. KASSNER: Am I being told now that a Carlos
13 Martinez is going to be a Government witness? Is that what
14 I am being told?

15 MR. CAREY: Your Honor, the Government is not
16 stating now that Mr. Carlos Martinez will or will not be.
17 He is a prospective Government witness.

18 MR. KASSNER: If he isn't a prospective Govern-
19 ment witness, your Honor, what would the interpreting of
20 Michael Torres have to do with anything in this case? I
21 don't know what Michael Torres has to do with this case.
22 I don't even understand what my clients have to do with
23 the other half of this case.

24 Your Honor may be troubled by the two counts
25 in this case. I am much more troubled by the two con-

j h j p

105

spiracies in the two counts. I am much more troubled by the fact that they tried to take every marijuana and cocaine bust in the last year and a half, jumble it all into one case as a conspiracy, and then throw on top of it every person they thought was an importer of cocaine, and with the shotgun method, attempt to get everybody involved in everything that was ever done, regardless of whether an agreement between these people existed or didn't exist.

THE COURT: That is going to a more basic problem which is not before me really today, except tangentially.

I think I have heard argument on both sides to the extent where I can understand both of your positions. I am not prepared to rule on it at this time. I would like to think about it. So I will reserve decision and I will come to some conclusion before the 20th. This case is on the 20th again.

MR. CAREY: Yes, your Honor.

THE COURT: At that time I hopefully will have
made up my mind in this matter.

MR. KASSNER: Your Honor, again I would like to remind your Honor the one fact here that the U.S. Attorney is not willing to state is that these three women, the Caban sisters and Rita Ramos, be they witnesses or not witnesses, will testify that they even know these two

1 jhjp

2 defendants.

B19 3 THE COURT: They don't have to testify in a
4 conspiracy case that they know the defendants. They can
5 very well make out some very critical part of the con-
6 spiracy which does not involve these defendants at all
7 and then if the jury would find that there was a con-
8 spiracy and they were part of it they would be charged
9 with that conduct as well as any other conduct which existed
10 during the life of the conspiracy.

11 So that argument in and of itself doesn't par-
12 ticularly give me pause at this particular time, because
13 in a conspiracy charge there is no need for all the parties
14 to know one another, there is no need for all the parties
15 to act in concert together. There is simply a need to show
16 the existence of a conspiracy, that the defendant was a
17 part of it during the life of the conspiracy and an overt
18 act was done.

19 MR. KASSNER: But I respectfully submit there
20 is no one conspiracy here, but there are two conspiracies,
21 and these women will be testifying as to the other con-
22 spiracy and not as to this.

23 THE COURT: That may be so, but I tell you now
24 that if this case goes to the jury I will charge the jury
25 that unless they find one single solitary conspiracy they

1 jhjp

2 may not convict these defendants, and under those circum-
3 stances, even though he is in the other branch of it, it
4 will still affect him, because it would be part of the
5 evidence against all of them.

6 MR. KASSNER: If your Honor please, if you
7 stick these two conspiracies together and bring them to
8 trial in these two conspiracies the prejudice will be such
9 as it can never be cured by any charge you will ever make.

10 THE COURT: That is another point which I as-
11 sume you have made motions on.

12 MR. KASSNER: I haven't had a chance to make
13 any motions yet, your Honor. I have a new indictment handed
14 down this morning.

15 THE COURT: When the motion comes down then
16 I will be able to decide that. I can't make up my mind on
17 that. I haven't even heard argument on it really except
18 tangentially here. I will rule on that also if and when
19 the times comes.

20 MR. KASSNER: You have to remember this, your
21 Honor: There are going to be 20 lawyers, 30 lawyers in
22 this case. If this Rita Ramos and these two Caban sisters
23 testify as to incidents with other defendants it will be
24 the lawyers for the other defendants who will be in a posi-
25 tion to properly cross examine her with respect to what

2 she testifies. I will not be able to cross examine her
3 unless she testifies as to relationships with my clients.

4 THE COURT: Not particularly. No, that isn't
5 so. In a conspiracy case, you could examine every witness,
6 and you have a right to, because anything that establishes
7 the conspiracy is your business, and even though your client
8 is not mentioned at the particular time and had nothing to
9 do with it, you still have not only a right but an obliga-
10 tion to make sure that every element of the conspiracy is
11 proven.

12 MR. KASSNER: I am sure when you have 30 or
13 40 lawyers in a case that we will not have to participate
14 in the cross examination of a witness who testifies as to
15 facts which my clients have no knowledge of. There are
16 30 or 40 lawyers who will be able to cross examine her on
17 the issues as to which their clients have knowledge and
18 my clients won't be deprived of counsel with 30 or 40
19 lawyers in the case.

20 THE COURT: I understand your point, but I can
21 see it's a matter of argument. I will think about it. As
22 I say, I will come to some decision before the 20th. I
23 will reserve decision in the meantime.

24 MR. KASSNER: Does your Honor want us to dis-
25 cuss the issue of these two?

2 THE COURT: I don't know what you mean.

3 MR. KASSNER: Representing the two defendants.

4 THE COURT: Oh, yes. I am going to decide all
5 issues, yes.

6 MR. KASSNER: To the best of my knowledge, in
7 this circuit there has been no case which has said that
8 if the defendants are made aware of the fact that they are
9 being represented by a single counsel and that there could
10 possibly be a conflict as a result of this representation
11 and they state in open Court that they still desire the
12 same counsel, I don't think there is a case anywhere that
13 says that you must appoint two separate counsel. The case
14 I think your Honor is referring to is a case where the
15 attorneys said, "I don't believe there is a conflict," and
16 then there was a reversal. But there was never a reversal,
17 to the best of my knowledge, where before the case the clients
18 said there is no conflict and we desire the same attorney.

19 THE COURT: I have a Third Circuit case in mind
20 which indicates that actually the obligation is not on the
21 defendants to make up their mind as to whether or not the
22 conflict, if there is one, can be resolved by them waiving
23 their rights to it, but it's the obligation of the Court
24 to do it.

25 But I will look into it. As I say, I reserve

1 jhjp

109A

2 decision on it.

3 MR. CAREY: Your Honor, the Government requests
4 that the writs be adjourned to May 20th.

5 THE COURT: So ordered.

6

7 ---

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 UNITED STATES OF AMERICA,

5 vs.

6 FRANCISCO ARMEDO-SARMIENTO and 5-75 Cr. 429
7 LIBARDO GILL,

8 Defendants :

9 -----x
10 Before:

11 HON. JOHN M. CANNELLA,

12 District Judge

13 September 2, 1975
14 9:40 a.m.

15
16 APPEARANCES:

17 PAUL J. CURRAN, ESO.,
18 United States Attorney,
for the government,
19 BY: MICHAEL Q. CAREY, ESO., Assistant United States
Attorney

20
21 SEYMOUR DETSKY, ESO.,
Attorney for defendants.

1 jhr

2

2 THE CLERK: United States of America vs.
3 Sarmiento and Gill.

4 Is the government here?

5 MR. CAREY: The government is here.

6 THE CLERK: Defendants?

7 MR. DETSKY: Seymour Detsky.

8 THE COURT: The defendants are in custody,
9 are they not?

10 MR. CAREY: Yes, they are.

11 THE COURT: Why haven't they been brought
12 over?

13 MR. CAREY: I didn't know your Honor wanted
14 them here.

15 THE COURT: In the first place, I don't
16 have any hearings of any kind unless the defendants are
17 here, which is my practice.

18 In the second place, it requires them under
19 my order to get another lawyer and they should be the
20 first ones to know.

21 MR. DETSKY: I am going to ask, if your
22 Honor please, that he give me the privilege of asking
23 him to reconsider his decision.

24 THE COURT: I gave this a great deal of
25 thought, Mr. Detsky. I didn't just do it off my cuff.

1 jhr

3

2 I am concerned about it. Did you read my memorandum?

3 MR. DETSKY: Yes, I did, and I feel, if
4 your Honor please, there has been a basic confusion
5 which has run through the entire decision, if you will
6 forgive my saying so.

7 May I point out, if your Honor please, that
8 originally we were retained to represent Omar Hernandez
9 in the original case, before there was a superseding
10 indictment. At that time we advised the Court that there
11 might be a conflict because we felt that there was an
12 overlapping of interest between Rita Rondinel and
13 Hernandez. They knew each other, they had contact with
14 each other in some way in the past. That is what we knew.
15 What the nature of the contacts were we did not know,
16 but we knew that they knew of each other.

17 I told Mr. Warburgh, in fairness to the Court,
18 in fairness to Mr. Carey, in fairness to the witnesses
19 that we represented, that we had to reveal this to the
20 Court. I didn't know whether it would be that basic
21 a conflict because basically the cases in which we
22 represented Rita Rondinel had nothing whatever to do with
23 Omar Hernandez. They dealt with her either possessing
24 cocaine or selling cocaine, in which we were successful
25 in representing her in the state courts.

1 jhr

4

2 Now, with the Caban girls we never really got
3 into the case at all, because as soon as we got into the
4 case and began probing how they were arrested and the
5 manner in which they were arrested, and there was a
6 difficulty of language, they spoke only Spanish, we spoke
7 English, it was hard to get interpreters to accompany
8 us to Rikers Island to see them, but by the time we got
9 the drift of what the case was about we were moving
10 to suppress when one day we met the district attorney
11 in the courtroom and he told us that a proposed witness
12 against the Caban girls would be Rita Rondinel, whom
13 we had represented, and who we were representing at that
14 very moment in another case, and she never told us she would
15 be a witness, and when I confronted her with it she said
16 she was.

17 I said "Then I have to withdraw from your
18 case and from the Caban girls' case only because it would
19 be embarrassing to you."

20 There is nothing ever in my relationship with
21 either Rita Rondinel or the Caban girls that had anything
22 to do with Sarmiento or had anything to do with Libardo
23 Gill. They never mentioned their names to me ever.
24 Libardo Gill I would safely say doesn't even know Rita
25 Rondinel. Sarmiento has never met Rita Rondinel, has

1 jhr

2 never met the Caban girls.

3 I asked them specifically and I spoke to them
4 and I wanted to get to the bottom of it because I knew
5 their names were never mentioned to me.

6 I have never in any way gotten possession
7 of any information other than the information that Rita
8 Rondinel or the Caban girls would be testifying to in this
9 courtroom.

10 THE COURT: Your associate doesn't seem to
11 think so.

12 MR. DETSKY: Mr. Paul Warburgh only stated
13 that with reference to Mr. Hernandez, from whom we with-
14 drew. At that time Mr. Libardo Gill and the defendant
15 Sarmiento had not yet been made parties to any indictment.
16 This was a superseding indictment.

17 We have been representing Sarmiento in the
18 state courts and representing Libardo Gill in the state
19 court and Libardo Gill in the state court we pleaded
20 guilty and got a one-year sentence thereafter we
21 had made a motion to suppress and as a result of the
22 motion to suppress and while the hearing was going on,
23 during that motion to suppress, Mr. Herman, the Assistant
24 District Attorney there, came along and through the judge
25 at a bench conference offered us a one-year jail term.

1 jhr

6 .

2 When we spoke to Mr. Libardo Gill he agreed
3 to accept the one-year jail term because he had already
4 been serving so much time in that courthouse
5 awaiting trial that at least he would have jail time in
6 while awaiting trial in this court.

7 I might also add that part of the negotiations
8 before the judge included my representation of Mr. Herman
9 a representation he would get Mr. Carey to drop any and
10 all charges against Mr. Gill and that he would completely
11 withdraw any charges against Mr. Gill. I don't know what
12 happened in their negotiations. Suffice it to say that
13 that did not occur.

14 But the fact remains that as far as Libardo
15 Gill and Sarmiento is concerned I honestly advise this
16 Court on my own that there is no conflict and cannot
17 be any conflict between Rita Rondinel and Sarmiento or
18 Mr. Gill. There is nothing that they will reveal
19 in this Court that I will not know from their lips while
20 sitting in this court. There is nothing that they
21 will say that I already know. There is nothing in their
22 background that I will not already know.

23 I know, for example, that they were convicted
24 of a crime. He knows that they were convicted of a
25 crime. That is nothing new. It's going to come out

1 jhr

2 in the courtroom. The Caban girls I know pleaded guilty.
3 That is going to come out in the courtroom.

4 Like any other defendant who is testifying
5 on behalf of or any witness who is testifying on behalf
6 of the government, they will be asked were you promised
7 anything by virtue of your testimony here. They will
8 either say yes or they will say no. If they say no I
9 am bound by their testimony because I don't know what
10 was promised to them and I haven't the vaguest conception
11 of what was promised to them. So where is there a
12 conflict?

13 THE COURT: All right. Let Mr. Carey
14 give his version of where he feels the conflict is.

15 MR. CAREY: Your Honor --

16 THE COURT: The trouble with it is that
17 you have a conspiracy charge here which even though
18 the people don't know each other finally winds up having
19 some effect on any defendant that is in the case.

20 MR. DETSKY: But the fact is that Sarmiento
21 and Gill are entitled to their best representation and
22 entitled to have as attorneys those they have confidence
23 in.

24 THE COURT: I understand that.

25 MR. DETSKY: You know how long it took us to

1 jhr

8

2 get to conference with Sarmiento. That man had four
3 different lawyers from whom he had broken away and only
4 after his brother came up to see us and after relatives
5 came up to see us about him was it possible to get him to
6 speak to us.

7 THE COURT: I am very sensitive to that
8 aspect of it, Mr. Detsky.

9 MR. CAREY: Your Honor, I have not read
10 your Honor's decision so I do not know the basis on --

11 THE COURT: Read it. We have nothing
12 else to do here. After you read it let me know when
13 you are ready and I will come back.

14 You have read it, Mr. Detsky, right?

15 MR. DETSKY: Yes, sir.

16 THE COURT: All right. Let me know when you
17 are finished reading it.

18 MR. CAREY: Yes, your Honor.

19 (Recess)

20 MR. CAREY: Your Honor, my apologies for
21 delaying the Court.

22 I have read the Court's memorandum and order
23 concerning the government's motion to disqualify Kassner
24 and Detsky. It appears to me from what I heard Mr. Detsky
25 say this morning that he hasn't addressed himself at all

1 jhr

2 to the grounds for your Honor's decision.

3 Your Honor has stated, as the government
4 argued previously, that Carmen Caban is a material witness
5 against the clients he represents. Whether or not
6 Carmen Caban will be able to make an in-court identification
7 of the defendants is irrelevant to whether or not a conflict
8 exists because of the prior representation of Carmen Caban
9 by the firm of Kassner and Detsky and the present
10 representation of the two defendants.

11 I really see nothing other than to point out
12 that I believe Mr. Detsky's comments are irrelevant to the
13 basis for your Honor's motion.

14 THE COURT: He has a right to make argument,
15 of course. There is no question about that. But it
16 seems to me in certain aspects it really bolsters what
17 I have already said.

18 The one example he gave, what he knows
19 she is going to say on the stand, if she doesn't say that --
20 he didn't go further than that -- if she doesn't say
21 that then he knows that she didn't say it and he is in
22 possession of some knowledge which would be an advantage.

23 MR. DETSKY: If your Honor please, I said
24 I don't know what they have been promised by the government
25 or what has been given them and I am bound by whatever

1 jhr

10.

2 answer they have given.

3 The implications of your decision are that if a
4 man ever represented a defendant in a criminal case and
5 it subsequently turns out two or three years later that
6 that defendant turns out to be a witness for the government
7 that this lawyer is forever disqualified from representing
8 him in another case where that person is a witness.

9 Isn't that what it means?

10 THE COURT: No, it doesn't mean that. It
11 means in this particular case, which I treat as *sui generis*,
12 that in this particular case I find that there is a danger
13 here, and I am not going to go into a situation where it
14 is all said and done, I go through a rigamarole with them
15 in which they tell me yes, they understand everything,
16 then the interpreter tells them, then the interpreter comes
17 back and tells me what they said, then God forbid there
18 is a conviction in the case, the first application will
19 be a 2255.

20 I have had that happen to me not only once
21 but many, many times. As a matter of fact, it was
22 ludicrous in one case, because the person was not
23 Italian but Sicilian, and I happen to be Sicilian, and I
24 went through with him during the trial not only the
25 translation by the interpreter but also the Sicilian

1 jhr

11.

2 of it. Then lo and behold when he was convicted as a
3 post trial remedy, he really didn't understand what he
4 said. The interpreter said it but he didn't understand
5 it, the judge said it but he didn't understand it.

6 I am not going to go through that kind of
7 rigamarole with these people.

8 MR. DETSKY: I think the defendants have a
9 right to be told they have an option to retain our firm
10 despite what your office considers the conflict of
11 interest on the part --

12 THE COURT: We will get to that when they
13 get here. When they get here I am going to tell them
14 exactly what I ruled and what their obligations are.
15 That is the next order of business.

16 I have heard your argument. I am not persuaded
17 by it. I stand by the decision in the memorandum
18 as I filed it.

19 MR. DETSKY: Your Honor, can we have leave
20 to appeal this decision?

21 THE COURT: Sure you have.

22 MR. DETSKY: I would like the matters held
23 in abeyance until --

24 THE COURT: I am not holding anything in
25 abeyance. If you want anything held in abeyance you get

1 jhr

12

2 your stay from the Court of Appeals. I am not going
3 to stay this case.

4 I have been trying to get this case on for
5 trial for a long time. There are motions all over the
6 place, speedy trials and everything else. I am not
7 going to lend one second to any argument that I was not
8 ready to try this case and I was not ready to proceed.
9 If you want to get a stay you will have to get it from the
10 Appellate Court.

11 What I want now and what I direct now, Sarmiento
12 I understand is in jail and the other person, Gill --

13 MR. DETSKY: He is up there under Estrada,
14 I believe.

15 THE COURT: I want him brought down as soon
16 as possible. I understand he is in Clinton. Who is
17 here in the local jail?

18 MR. DETSKY: Sarmiento.

19 THE COURT: As soon as get Sarmiento
20 here we will call you, Mr. Detsky. You don't need to hang
21 around here.

22 MR. DETSKY: Would your Honor rather do this.
23 I have a meeting back at the office.

24 THE COURT: I want to suit your convenience.

25 MR. DETSKY: I can be back here again tomorrow

1 jhr

2 or September 4th, which is preferable. We have a very
3 big calendar after this Labor Day weekend. If you make
4 it for September 4th I would appreciate it.

5 THE COURT: I will tell you what we will do.
6 You think you could be here later in the day?

7 MR. DETSKY: It would be difficult for me.

8 THE COURT: You probably can't get the
9 other one down before the 4th anyhow?

10 MR. CAREY: No, your Honor. Mr. Sarmiento
11 is in Rikers Island in state custody, not in federal
12 custody, so a writ will have to be signed to attain his
13 presence.

14 THE COURT: We will do it on the 4th then.
15 That is apparently the first available time in conformity
16 with your request, which I assume you are making.

17 MR. DETSKY: Yes, right.

18 THE COURT: All right, fine.

19 MR. DETSKY: Will that be at 9:30 in this
20 court?

21 THE COURT: Yes. I will get you out of
22 here as soon as we can. I know you have other business.
23 I have a trial I am starting too.

24 MR. DETSKY: Your Honor, I feel if
25 Sarmiento knows what the situation is I think he will

1 jhr

14

2 elect to keep us. It took us eight months to establish
3 a degree of confidence. I am more worried about him
4 than I am about myself. He is very tight-lipped. He
5 refuses to disclose information. It's very difficult
6 even talking to him.

7 THE COURT: I did take that into consideration,
8 Mr. Detsky. I am aware that this is a troublesome matter,
9 a troublesome area. There is very little written on this
10 actually.

11 But the point of the matter is that I have
12 given it very serious thought and I simply don't agree
13 with you, that's all. You have a remedy, so you seek
14 your remedy.

15 MR. DETSKY: I think the question here is
16 of such deep and profound importance, your Honor, that it
17 should be appealed immediately.

18 THE COURT: You go ahead and do it. You can
19 walk right out and appeal it. Your order is there.

20 MR. DETSKY: Right.

21

22 - - -

23

24

25

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 - - - - - x

4 UNITED STATES OF AMERICA :
v. :
5 : S-75 Cr. 429

6 FRANCISCO ADRIANO AMENDO-SARMIENTO :
and LIBARDO GILL, :
7 :
Defendants.
8 :
9 - - - - - x

10 September 4, 1975,
11 Before:
12 Hon. John M. Cannella,
District Judge.
13 Appearances:
14 SEYMOUR DETSKY, ESQ.,
For defendants.
15 MICHAEL Q. CAREY, Assistant U.S. Attorney,
For the Government.
16 Gustavo Hoffman, Spanish interpreter
17
18
19
20
21
22
23
24
25

1 jph

2

2 THE CLERK: United States of America v. Sarmiento
3 and Gill. Both parties here?

4 MR. CAREY: The government is ready, your Honor.

5 THE COURT: Where is the defendant?

6 MR. CAREY: Your Honor, I directed the United
7 States marshals to produce the defendants.

8 THE COURT: Well, I don't see them here this
9 morning.

10 MR. DETSKY: I tried seeing him at Rikers Island
11 yesterday. I found -- they told me they were being trans-
12 ferred to the new federal facility here. I called the federal
13 facility here. I could not reach them.

14 THE COURT: We will put it on for quarter to 2.

15 MR. DETSKY: If your Honor please, between the
16 time I left here and the time I went to my office, there
17 was a case called United States v. Jeffers, 7th Circuit,
18 which I feel is instrumental in this case.

19 THE COURT: Well, as my clerk indicated to you,
20 we did know about that case. It is in the opinion and I'm
21 aware of it. So by a quarter to 2 you can argue the point
22 again. If they are not here, I won't listen to people unless
23 the defendants are here.

24 MR. DETSKY: If your Honor please, may I also
25 point out we need a Spanish interpreter because neither

1 jph

3

2 one speaks English.

3 THE COURT: But you have an obligation to produce
4 an interpreter. Why does he need to produce it?5 MR. DETSKY: I am not the one who is asking
6 for it.

7 THE COURT: Oh, no, they are your clients.

8 MR. DETSKY: I can't produce an interpreter at
9 quarter to 2.10 MR. CAREY: Your Honor, I will have an interpreter
11 at a quarter to 2.12 THE COURT: All right, the government will have
13 an interpreter. You are a practicing lawyer, Mr. Detsky,
14 and you know it is your obligation to produce a Spanish
15 interpreter for your clients. You heard me say it before
16 and I don't listen to people unless the defendants are here.
17 Now be back at quarter to 2 and the interpreter will be
18 here and we will continue on at that time.

19 MR. DETSKY: All right.

20 THE COURT: Thank you.

22 ----
23
24
25

1 jph

4

2 2 P.M.

3 THE CLERK: United States of America v.
4 Sarmiento and Gill. Government ready?

5 MR. CAREY: Yes.

6 THE CLERK: Defendant ready?

7 MR. DETSKY: Yes.

8 THE COURT: Mr. Detsky, you know I was on trial
9 and I told you to come in at a quarter to 2.

10 MR. DETSKY: I was delayed on the East River Drive.

11 THE COURT: You can't run a courthouse with split
12 second precision but for the same reason I would expect
13 you to try to get here a little earlier. Now the purpose
14 of this hearing is to inform the defendants in this case--
15 by the way, this is the interpreter and are you satisfied
16 with him or do you want to ask him anything?

17 MR. DETSKY: I have no idea about him.

18 THE COURT: What do you want me to do about it,
19 Mr. Detsky. The government has produced him and says 'that
20 he is a competent Spanish interpreter. Do you want to talk
21 to him or do something about it, go ahead and do something
22 about it now.

23 MR. DETSKY: I haven't had a chance to speak to
24 my clients because they were in transit and I think I ought
25 to have an opportunity to speak to them first.

1 jph

5

2 THE COURT: I want to find out first if you are
3 satisfied with the interpreter.

4 MR. DETSKY: If he can speak -- they are from
5 Colombia.

6 THE COURT: Ask him whatever you want.

7 MR. DETSKY: Do you speak Spanish from Colombia?

8 THE INTERPRETER: Yes.

9 THE COURT: Have you interpreted before?

10 THE INTERPRETER: Yes.

11 THE COURT: What is your prior experience?

12 THE INTERPRETER: I was a Spanish interpreter
13 for the United Nations and for the United States Department
14 of Justice here and in Washington for the government.

15 THE COURT: Are you satisfied?

16 MR. DETSKY: Yes.

17 THE COURT: I want you to tell them as you talk
18 and as I talk.

19 THE INTERPRETER: (Sworn by clerk)

20 Gustavo Hoffman.

21 THE COURT: Mr. Detsky, I instruct you to tell
22 the defendants what has happened here in this case and
23 indicate to them that the court wants them to have and
24 get another lawyer.

25 MR. DETSKY: And, if your Honor please, they have an

1 jph

6

2 option to retain if they so desire--

3 THE COURT: They do not have an option to retain
4 you and I said you cannot act in this case and I filed
5 an order to that effect.6 MR. DETSKY: I want to put one more thing on
7 the record, if your Honor please. I know that your Honor
8 has indicated his feelings in the matter and there is
9 an order on file. I don't know if your Honor is aware
10 of the fact that Rita Rondenel, who is one of the prospective
11 witnesses against these defendants and whom I have told your
12 Honor these defendants do not know, but the fact is that Rita
13 Rondenel has testified in a state court proceeding against
14 the Caban girls, Gloria Caban and her sister. Everything
15 that she said in that case is a matter of public record,
16 every examination that was conducted of her, every cross-
17 examination that was conducted of her is a matter of public
18 record. There is nothing she can say in this court that is
19 different or in any way other than what she's already
20 testified to as a matter of public record. I also wish--
21 I also brought to your attention the case of United States
22 v. Jeffers which your Honor says he was familiar with and
23 took into consideration at the time he wrote his opinion.
24 But I am constrained to ask this court one other thing.
25 One of the reasons I have been asked or we have been directed

1 jph

7

2 to disqualify ourselves or to be disqualified in this
3 case is because we allegedly would have an advantage over
4 the prosecutor in this proceeding in that we might know
5 more about the background of these witnesses than the prosecu-
6 tor would want the attorneys for the defendant to have.
7 I'm just wondering, if your Honor please, in a question of
8 this type of situation whether under Brady v. Maryland,
9 if the prosecutor has information that he doesn't want me
10 to be privy to and that I cannot undertake to present for
11 my clients' behalf whether he's not depriving us of Brady
12 material that is of vital importance to the rights of
13 my defendants.

14 THE COURT: What is Brady v. Maryland?

15 MR. DETSKY: If your Honor please, I'm trying to
16 understand your logic in this situation.

17 THE COURT: Listen I am not going to explain
18 my decision. You have an exception to it. You can do whatever
19 you want about it. I'm not going to start to regurgitate
20 the matter. I have indicated the purpose of this hearing
21 and I am going to limit it to that and that is to inform the
22 defendants that they do not have attorneys now and they
23 are to get another attorney, period.

24 MR. DETSKY: I also wish to inform them I am taking
25 an appeal to the Court of Appeals.

1 jph

8

2 THE COURT: I couldn't care less, I told you to
3 do it when I filed the memorandum opinion and the
4 memorandum opinion has been on file since Friday and
5 you're still telling me you're going to appeal.

6 MR. DETSKY: We have filed on those appeals, sir,
7 and we have drawn up the papers and they will be done today
8 and while it was done on Friday there was a Labor Day weekend
9 in between.

10 THE COURT: Do whatever you want to about it.
11 I'm not going to enlarge the agenda of this particular
12 hearing and simply inform the defendants as far as I'm
13 concerned they do not have attorneys and they are to get
14 attorneys and then you can talk with them and tell them
15 whatever you want after you get through with informing
16 them of this fact. Now, Mr. Gill, you are Gill, are you not?
17

DEFENDANT GILL: Yes.

18 MR. DETSKY: He is also known as Mr. Estrada.

19 THE COURT: You can pronounce Estrada as a different
20 name Estonas. In any event Mr. Gill, I inform you now
21 that because of certain matters which I have already filed
22 an opinion on, I am disqualifying the lawyers which repre-
23 sented you up to this point, to the point of filing of
24 the opinion and therefore it would be necessary for you
25 to get a lawyer and if there is any way you feel the court

1 jph

2 can assist you in this way, we will be glad to do it or
3 you can get Mr. Detsky's help or anybody else's help for
4 you to get a lawyer and I'm going to put this case on for
5 Monday to find out what progress you made in trying to get
6 a lawyer. Now Mr. Sarmiento, I say the same thing to you.
7 Your lawyer has been disqualified.

8 THE INTERPRETER: The defendant asks whether
9 he can answer you?

10 THE COURT Oh, yes.

11 DEFENDANT GILL: Since my wife is in the same case
12 and she already has a lawyer, could I get together with
13 her and have the same lawyer represent the two of us?

14 THE COURT: Well, now, it depends upon whether
15 there is a conflict of interest between your wife and yourself
16 and you both agree that the one lawyer can act for you.
17 So you want to have him come here on Monday and see if
18 he can act for you?

19 DEFENDANT GILL: Yes, with your recommendation.
THE COURT:
20 / Do you want me to direct the clerk of the court to call the
21 man on the telephone to come and see you as soon as he can?

22 DEFENDANT GILL: If you would be so kind.

23 THE COURT: Give the lawyer's name to the clerk
24 of the court and his name and telephone number. Do you
25 know it, Mr. Carey?

1 jph

10

2 MR. CAREY: Yes, sir.

3 THE COURT: What is his name?

4 MR. CAREY: The name is Murray Cutler.

5 THE COURT: Yes, I know that attorney, he appeared
6 many times before me in the state court and we can get
7 in touch with him and we will tell him to come and see
8 you as soon as possible. All right. Now Mr. Sarmiento,
9 I have indicated that the lawyer you had has been dis-
10 qualified by me because of matters that appear in an
11 opinion which I filed and under the circumstances, thereby
12 necessary for you to get another lawyer. Now I'm going
13 to put it down for Monday to see what progress you make
14 getting a lawyer. If you need any help from the court in
15 any way, I will try to assist you. If you want Mr. Detsky
16 or anybody else to help you in this area to get another
17 lawyer, you're free to do that and I'm going to put the
18 case on for Monday to see what progress you made in this
19 regard.

20 DEFENDANT SARMIENTO: That's fine, your Honor.
21 Since my family has been paying for the lawyer and since
22 Mr. Detsky had been receiving dues for his services, I
23 would like to find out how this is going to be solved and
24 I would like to ask your Honor for some more time. Because
25 my family is far away.

1 jph

2 THE COURT: Well, Mr. Detsky is here and you can
3 talk with him and find out what advice he wants to give
4 you.

5 DEFENDANT SARMIENTO: At any rate to be able
6 to communicate with my family is going to take some time.

7 THE COURT: Well, I am going to put this on for
8 Monday to see how much progress you make by Monday. And
9 I advise you now under the provisions of the law of our
10 county and of the Southern District, if you do not presently
11 have funds to get a lawyer, the court can furnish a lawyer
12 to you free of charge.

13 MR. DETSKY: If your Honor please, you are putting it
14 on for Monday and expect me to be here, I have a trial
15 out in Suffolk County.

16 THE COURT: That's fine you do whatever you want
17 to do. If you show up or don't show up, you are out of the
18 case. As far as I am concerned you are the servant at the
19 feast here. You don't have any standing here.

20 MR. DETSKY: Fine.

21 THE COURT: Do you have anything else to ask,
22 Mr. Sarmiento?

23 DEFENDANT SARMIENTO: I would just like to request
24 more time to be able to get in touch with my family, because
25 no lawyer will work without money.

1 jph

12

2 THE COURT: I indicated to you if you do not have
3 present funds which you can use, the court is in power
4 to assign a lawyer to you and you don't have to pay him.
5 Think about it and I will put it on for Monday and I will
6 talk to you again at that time. All right. Is there anything
7 else you want to ask me, Mr. Sarmiento?

8 DEFENDANT SARMIENTO: No.

9 MR. DETSKY: Your Honor please, if I may have
10 the opportunity to speak with my--

11 THE COURT: Sure you can, yes.

12 MR. CAREY: Does your Honor want Carmen Estrada
13 or Carmen Cill to be produced also at that time?

14 THE COURT: Yes, both of them. The wife, yes, because
15 of the fact there might be conflict, yes, bring her in.

16 MR. CAREY: I will try to get a writ to the
17 marshals today in that regard. I believe she is outside
18 the State of New York.

19 THE COURT: All right, see what progress
20 you make.

21 MR. CAREY: May we have the writ adjourned on
22 Sarmiento?

23 THE COURT: All right.

24 9:30 Monday morning.

25

--

KASSNER & DETSKY

93a

COPY

Memorandum Decision and OrderAppealed From.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X -----
UNITED STATES of AMERICA, : MEMORANDUM DECISION
: AND ORDER
-against- :
ALBERTO BRAVO, et al., : 75 Cr. 429 (JMC)
Defendants. :
----- X -----

CANNELLA, D.J.:

The Government's motion to disqualify the law firm of Kassner & Detsky from further representation of defendants Libardo Gill and Francisco Adriano Armedo-Sarmiento in Indictment 75 Cr. 429 is hereby granted and said firm is hereby relieved as counsel for these defendants.

The Kassner firm previously represented Omar Hernandez, who is also a defendant herein, on Indictment 74 Cr. 1128 (which the instant indictment superseded). Upon the motion of the Government, a hearing was held in 74 Cr. 1128 on March 21, 1975 to determine whether, in light of counsel's previous representation of two prospective Government witnesses, the Kassner firm should be allowed to represent Mr. Hernandez. At the close of said hearing the Court ruled (Tr. 19-20) that the Kassner firm would be barred from continuing its representation of Mr. Hernandez.

Memorandum Decision and OrderAppealed From.

Soon thereafter, Indictment 74 Cr. 1128 was superseded by the instant indictment which charges 38 individuals with violating 21 U.S.C. §§ 846, 963 by conspiring to import and distribute cocaine (count 1) and marijuana (count 2) between January 1, 1972 and April 30, 1975. A third count charges two individuals with unlawful possession of firearms during the commission of a felony in violation of 18 U.S.C. § 924(c).

When Francisco Adriano Armedo-Sarmiento and Libardo Gill, two of the defendants in 75 Cr. 429 retained the Kassner firm, the Government promptly moved to disqualify counsel on the following grounds: (1) A member or members of the firm have previously represented three prospective Government witnesses in cases in which these witnesses were criminal defendants; (2) the two defendants represented by the firm in the instant case have potentially conflicting interests; and (3) the firm's prior representation of Mr. Hernandez creates a conflict of interest. As we find that the first point urged by the Government mandates disqualification, we do not reach points two and three.

The Government has stated in open court that Carmen Caban, Gloria Caban and Renee Rondinell, all of whom are unindicted co-conspirators in 75 Cr. 429, are also

Memorandum Decision and Order Appealed From.

prospective Government witnesses. In addition, in an affidavit submitted in camera at the Court's request, the Government has stated that Carmen Caban will be one of, if not the key Government witness. She will allegedly testify in detail as to the source of the narcotics, the methods used to smuggle / into this country and the lines of distribution used by the conspirators.

The following statements from an affidavit submitted by Mr. Detsky at the Court's request outline his firm's involvement with these three witnesses:

With respect to Rita [Renee] Rondinel, he [Detsky] knew her both under that name and under the name of Rita Ramos. I believe that we represented her in about four matters each one of which charged her with possession of a controlled substance and in one instance the possession and sale of a controlled substance to an undercover agent. The last case was the case involving the sale to an undercover agent which we did not complete when we learned that she was going to be a witness in a case where we represented defendants. In the other cases the matters were either dismissed or resulted in a misdemeanor plea and no prison term.

We last represented Rita Rondinel as Rita Ramos in or about January 1974.

With the Caban sisters we were retained to represent them in the case where they were found in possession of a quantity of cocaine in their apartment. We were in the process of moving to suppress the evidence when we learned that Rita Rondinel was to be a witness against them. We duly advised the Court that we knew Rita Rondinel

Memorandum Decision and Order Appealed From.

and had represented her prior to her involvement in the Caban case and the Court asked us to withdraw from the case because Rita Rondinel said she would otherwise be embarrassed to testify.

At no time during all the period that I have been the attorney or that my office has acted as attorneys for Rita Rondinel or the Caban girls did they ever mention to us the name of any of the defendants that we are representing in this case.

The Kassner firm represented Carmen Caban from late July 1973 to late January or early February 1974, on a charge of possessing dangerous drugs on July 26, 1973. (Affidavit of Michael Carey, Assistant United States Attorney, submitted on August 28, 1975 at the Court's request.)

At the hearing held in 74 Cr. 1128, both Carmen Caban and Renee Rondinel stated in open court and after consultation with their respective attorneys, that they would not waive their attorney-client privilege. During the course of that hearing, Mr. Paul Warburgh of the Kassner firm stated "that there would be no conflict if these witnesses waive their privilege. If they don't waive their privilege, there will be a conflict." (Tr. at 2). At another point, Mr. Warburgh stated: (Tr. 4-5).

MR. WARBURGH: I think it is incumbent that they talk with their attorneys because it would appear to me that of course the government would probably request that they not waive their privilege because that would permit me to cross examine them concerning facts that probably only I know, and I may point out to the jury in this case that they are testifying with the understanding of receiving certain benefits and also some of the information that they may have told the government may be inconsistent with what I know, and it might be the government's position that they should not waive their privilege.

Memorandum Decision and OrderAppealed From.
From the above facts it is clear that members of the firm of Kassner & Detsky are in possession of a substantial amount of privileged information regarding the Caban sisters and Renee Rondinel. This information was acquired as a result of their representation of these individuals on charges of possessing and/or selling controlled substances during the period in which the conspiracy alleged in 75 Cr. 429 is said to have existed. In this posture, with Carmen Caban and Ms. Rondinel having refused to waive their attorney-client privilege, the Court cannot permit Kassner & Detsky to continue in this case.

Questions of whether or not to disqualify a law firm as a result of a conflict of interest present courts with particularly difficult tasks. As Judge Kaufman stated, there is a

responsibility to preserve a balance, delicate though it may be, between an individual's right to his own freely chosen counsel and the need to maintain the highest ethical standards of professional responsibility.

Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 564-65 (2d Cir. 1973). In a criminal case, however, the problem becomes even more acute. Thus, while the cases in this circuit dealing with the disqualification of attorneys in civil suits (see, e.g., Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., No. 74-1104 (2d Cir. May 23, 1975); Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975); Ceramco,

Memorandum Decision and Order Appealed From.

Inc. v. Lee Pharmaceuticals, 510 F.2d 268 (2d Cir. 1975); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974); Emle v. Patentex, supra), serve as guideposts for the present inquiry, we believe that in a criminal case there are two very significant additional factors. See Silver Chrysler, supra, slip op. at 3686 n. 8 (Adams, J., concurring). On the side of the balance favoring retention of counsel is the sixth amendment right to counsel with its implication of a right to counsel of one's choice (see discussion infra at 14), while on the side favoring disqualification is the interest of the once and possibly future criminal defendant in knowing that his confidences will not be used against him when he takes the witness stand. As stated in Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975), disqualification has been invoked in cases where the conflict of interest occasioned by

continued representation by chosen counsel clearly prejudiced the rights of the opposing party and, by creating the appearance of impropriety, posed a substantial threat to the integrity of the judicial process.

In such a case, disqualification is "a necessary and desirable remedy" permitting the court "to enforce the lawyer's duty of absolute fidelity and to guard against the danger of

Memorandum Decision and OrderAppealed From.
inadvertent use of confidential information...." (id.).

As noted above, because this is a criminal case the sixth amendment serves to bolster the argument in favor of permitting the client to retain the attorney of his choice. At the same time, however, it also acts to increase the importance of the considerations favoring disqualification. In this context, the command of Canon 4 of the Code of Professional Responsibility that "A Lawyer Should Preserve the Confidences and Secrets of a Client," as well as that of Canon 9 that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety" must be viewed as even more essential than in a civil proceeding. The paramount importance of protecting the sanctity of the attorney-client privilege in a criminal case is well stated by Dean Monroe Freedman in his recent Lawyers' Ethics in an Adversary System 4-5 (1975) (footnotes omitted).

The lawyer can serve effectively as advocate, however, "only if he knows all that his client knows" concerning the facts of the case....

Obviously, however, the client cannot be expected to reveal to the lawyer all information that is potentially relevant, including that which may well be incriminating, unless the client can be assured that the lawyer will maintain all such information in the strictest confidence. "The purposes and necessities of the

Memorandum Decision and OrderAppealed From.

relation between a client and his attorney" require "the fullest and freest disclosures" of the client's "objects, motives and acts". If the attorney were permitted to reveal such disclosures, it would be "not only a gross violation of a sacred trust upon his part", but it would "utterly destroy and prevent the usefulness and benefits to be derived from professional assistance". That "sacred trust" of confidentiality must "upon all occasions be inviolable", or else the client could not feel free "to repose [confidence] in the attorney to whom he resorts for legal advice and assistance". Destroy that confidence, and "a man would not venture to consult any skillful person, or would only dare to tell his counselor half his case". The result would be impairment of the "perfect freedom of consultation by client with attorney", which is "essential to the administration of justice". Accordingly, the new Code of Professional Responsibility provides that a lawyer shall not knowingly reveal a confidence or secret of the client, nor use a confidence or secret to the disadvantage of the client, or to the advantage of a third person, without the client's consent.

Accord, Ethical Considerations 4-1, 4-5. See also Judge Kaufman's discussion of the importance of enforcing Canon 4 in civil cases. Emle v. Patentex, 478 F.2d at 570-71.

In reply to the charge that their prior representation of the three prospective Government witnesses requires their disqualification, the Kassner firm makes two arguments. The first, articulated by Mr. Kassner at the hearing of this matter, is that the prospective witnesses do not know his clients, will not testify against them and that therefore "we won't even examine the girls, because

Memorandum Decision and OrderAppealed From.

the girls will say nothing, absolutely nothing about our clients. We will not examine them. We have no desire to examine them. We will certainly not divulge any interest." (Tr. at 87). Without in the least questioning Mr. Kassner's integrity or his sincerity, his promise is not enough. As the decisions in this circuit have recognized, a more objective standard is required. As the court said in Emle v. Patentex, 478 F.2d at 571,

A lawyer's good faith, although essential in all his professional activity, is, nevertheless, an inadequate safeguard when standing alone. Even the most rigorous self-discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in the earlier representation and transforming it into a telling advantage in the subsequent litigation. Or, out of an excess of good faith, a lawyer might bend too far in the opposite direction, refraining from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety. In neither event would the litigant's or the public's interest be well served. The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case. These considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage.

But see United States v. Jeffers, slip op. at 11, No. 74-1650

Memorandum Decision and OrderAppealed From.
(7th Cir. July 30, 1975). Thus, following Judge Wein-
feld's initial formulation in T.C. Theatre Corp. v.
Warner Bros. Pictures, Inc., 113 F.Supp. 265, 268 (S.D.
N.Y. 1953), the courts have applied the "substantially
related" test. That is, "where any substantial relation-
ship can be shown between the subject matter of a former
representation and that of a subsequent adverse represen-
tation, the latter will be prohibited." Id. at 268. To
establish a substantial relationship,

the former client need show no more than that
the matters embraced within the pending suit
wherein his former attorney appears on behalf
of his adversary are substantially related to
the matters or cause of action wherein the
attorney previously represented him, the
former client...."

Id. Applying this test in a criminal case presents certain
problems. However, by keeping clearly in mind that the
purpose of disqualification is to prevent the former client
from being in a situation where his former lawyer is using
privileged information against him, the substantially
related test can be made a serviceable jumping-off-point in
a criminal case.

For the purposes of this decision, the Court holds
that an attorney will be disqualified from representing a

Memorandum Decision and Order Appealed From.

criminal defendant in a case in which a former client, whom the attorney previously represented in a substantially related criminal proceeding, is an important adverse witness who refuses to waive the attorney-client privilege. This is not to suggest our belief that all of the above factors must coalesce before disqualification can be ordered. In fact, given the importance of impeachment in a criminal case, it may be that nothing more than prior representation (in either a criminal or a quasi-criminal case) of an important adverse witness would be sufficient to require disqualification. That situation, however, is not presently before us.

Here, the Government's key co-conspirator witness was previously represented in a criminal case involving possession of cocaine, during the period in which the instant conspiracy was allegedly active, by the law firm now representing two defendants against whom she will testify. Thus all the above criteria are satisfied and disqualification is required.

Mr. Kassner's argument that Ms. Caban will not testify against his clients ignores the fact that the indictment charges a massive conspiracy of which his clients are allegedly members. Mr. Warburgh has admitted that his prior

Memorandum Decision and Order Appealed From.

contact with Ms. Caban created a conflict as to his representation of Omar Hernandez. That his firm now represents one of Mr. Hernandez's alleged co-conspirators raises the same conflict.

Ms. Caban's testimony may in many ways implicate the Kassner firm's clients. For instance, once it has been established by a fair preponderance of the independent non-hearsay evidence that Caban, Francisco Adriano Armedo-Sarmiento and Libardo Gill and others were conspirators, testimony by Ms. Caban regarding hearsay statements of other co-conspirators will be admissible against Gill and Sarmiento. See, e.g., United States v. Wiley, No. 75-1082 (2d Cir. July 29, 1975); United States v. D'Amato, 493 F.2d 359, 363 (2d Cir.), cert. denied, 419 U.S. 826 (1974); United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970). Additionally, it appears from the Government's in camera affidavit that Carmen Caban's testimony is intended to establish, inter alia, that the alleged conspiracy was of an exceedingly large scope with geographically far-flung contacts, numerous "employees" dealing with substantial sums of money and equally substantial quantities of illegal drugs. The significance of this testimony from the point of view of the Kassner firm's clients is at least two-fold. First,

Memorandum Decision and Order Appealed From.

Ms. Caban's testimony may prove critical in convincing the jury that the alleged conspiracy existed, while another witness or other evidence may establish that Mr. Gill and Mr. Sarmiento were members. Secondly, evidence as to the size of the conspiracy may prove vital on the issue of whether or not the Government proves the single conspiracy alleged in the indictment, or multiple conspiracies as the Kassner firm urges in its motion for a severance. See, e.g., United States v. Mallah, 503 F.2d 971, 983-84 (2d Cir. 1974), cert. denied, 420 U.S. _____ (1975).

Considerations such as these make it clear that Carmen Caban is not merely another witness, but is ^{important} truly an adverse witness as regards the Kassner firm's clients.

The second argument advanced by the Kassner firm is based upon the Second Circuit's decision in United States v. Alberti, 470 F.2d 878 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973). Alberti, however, is inapposite. There, the court of appeals was faced with the post-trial argument of a convicted defendant that she had been denied her sixth amendment right to effective representation of counsel due to the fact that her attorney had previously represented a government witness. Here, however, the

Memorandum Decision and OrderAppealed From.

defendants' sixth amendment rights to conflict free representation are not at issue. In fact, the defendants have chosen to knowingly waive that right, a decision which in all likelihood we would permit. See United States v. Garcia, No. 74-3527, No. 74-3718 (5th Cir. Aug. 7, 1975). The problem here thus proceeds from the perspective of the previously represented witnesses, rather than the presently represented defendants.

By this decision the Court neither denigrates nor ignores the defendants' sixth amendment right to counsel. The right to counsel in a criminal case is, of course, a fundamental right guaranteed by the Constitution. From a reading of the Supreme Court's recent decision in Faretta v. California, 43 U.S.L.W. 5004 (U.S. June 30, 1975) (holding that a criminal defendant has the right to waive the assistance of counsel and proceed pro se), it can be suggested that by "inference" (id. at 5008 n. 15) the sixth amendment guarantees a defendant the right to the retained counsel of his choice. See United States v. Garcia, slip op. at 6963 n. 3, No. 74-3527 (5th Cir. Aug. 7, 1975); see also, United States v. Sheiner, 410 F.2d 337, 342 (2d Cir.), cert. denied, 396 U.S. 825 (1969). This right, however, like others guaranteed by the Constitution, is not absolute. In certain circumstances, when the reasons

Memorandum Decision and OrderAppealed From.
therefore are compelling, it may be infringed. See,
e.g., Ross v. Reda, 510 F.2d 1172, 1173 (6th Cir. 1975),
petition for cert. filed, 44 U.S.L.W. 3054 (U.S.
July 11, 1975) (No. 75-63) (no unconditional right to be
represented by out of state attorney of defendant's
choice); United States ex rel. Baskerville v. Deegan,
428 F.2d 714, 716 (2d Cir.), cert. denied, 400 U.S. 928
(1970) (upholding trial court's refusal to grant eve of
trial continuance to permit defendant to obtain new
counsel); cf. United States ex rel. Lloyd v. Vincent,
No. 75-2021 (2d Cir. July 16, 1975) (discussing permis-
sible restrictions on the sixth amendment right to a
public trial). Thus, this Court will not order that
privately retained counsel be disqualified absent sub-
stantial and compelling reasons of the sort here extant.

For the reasons aforesated, it is ordered
that the firm of Kassner & Detsky be, and hereby are,
relieved of all further representation of the defendants
Libardo Gill and Francisco Adriano Armedo-Sarmiento. The
aforesated defendants are directed to retain new counsel
at the earliest possible date as the Court intends to
proceed with this case on September 16, 1975, as previously
scheduled.

The defendants and a representative of the firm of Kassner & Detsky are hereby ordered to appear before the Court on September 2, 1975 at 9:30 A.M. in Courtroom #1306.

It is SO ORDERED.

John M Cannella

JOHN M. CANNELLA
United States District Judge

Dated: New York, New York
August 29, 1975.

1/ Rather than sealing the portions of this memorandum utilizing information contained in the Government's in camera affidavit, the Court, immediately prior to the filing of this memorandum, notified the Assistant United States Attorney in charge of this case of its appearance herein and was informed that the Government consents to their unsealed use.